Supreme Court, U.S.
FILED
061381 APR 18 2007
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

OMAR MEJIA-HUERTA, ANASTACIO PANTOJA-ARELLANO, JOSE ANDRES DEHUMA-SUAREZ, ANTONIO CRUZ-MARTINEZ, LUIS ESTRADA, AND TABRODRICK DESHAUN CRADDOCK,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD ANDERSON
(*Counsel of Record*)
JERRY V. BEARD
FEDERAL PUBLIC
DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 Taylor Street, Suite 9A10
Fort Worth, Texas 76102
(817) 978-2753

WALTER DELLINGER
MARK S. DAVIES
NICOLE A. SAHARSKY
SUSAN M. MOSS*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

* *Admitted in Idaho only*

Attorneys for Petitioners

QUESTION PRESENTED

In the opinion below, the Fifth Circuit recognized "an incongruent pattern of caselaw" in the federal courts of appeals, with the Second, Fourth, Sixth, Ninth, and Tenth Circuits differing from the Third, Seventh, Eighth, Eleventh, and now Fifth Circuits on the following question:

Whether Federal Rule of Criminal Procedure 32(h) requires that a district court provide notice of its intent to impose a sentence that is either above or below the sentence recommended by the Sentencing Guidelines.

PARTIES TO THE PROCEEDING

Petitioners are Omar Mejia-Huerta, Anastacio Pantoja-Arellano, Jose Andres Dehuma-Suarez, Antonio Cruz-Martinez, Luis Estrada, and Tabrodrick Deshaun Craddock, each of whom was a defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

A. Legal Background 4

B. Factual Background and Procedural History 8

REASONS FOR GRANTING THE PETITION 14

I. THERE IS AN ACKNOWLEDGED, DEEP CIRCUIT SPLIT ON THE QUESTION WHETHER RULE 32(H)'S NOTICE REQUIREMENT SURVIVES *BOOKER* 16

II. WHETHER RULE 32(H)'S NOTICE REQUIREMENT SURVIVES *BOOKER* IS AN ISSUE OF URGENT PRACTICAL IMPORTANCE WELL PRESENTED BY THIS CASE 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

United States v. Anati,
457 F.3d 233 (2d Cir. 2006).....17, 25, 26

Apprendi v. New Jersey,
530 U.S. 466 (2000).....7

United States v. Atencio,
476 F.3d 1099 (10th Cir. 2007).....17, 19

United States v. Booker,
543 U.S. 220 (2005).....*passim*

Burns v. United States,
501 U.S. 129 (1991).....*passim*

United States v. Cousins,
469 F.3d 572 (6th Cir. 2006).....17, 18, 25

United States v. Davenport,
445 F.3d 366 (4th Cir. 2006).....18

United States v. Dozier,
44 F.3d 1215 (10th Cir. 2006).....20, 25, 27

United States v. Evans-Martinez,
448 F.3d 1163 (9th Cir. 2006).....19, 25

United States v. Garza,
188 Fed. App'x 274 (5th Cir. 2006), *petition for cert. filed*, No. 06-8481 (U.S. Dec. 20, 2006).....22

United States v. Irizarry,
458 F.3d 1208 (11th Cir. 2006), *petition for cert. filed*, No. 06-7517 (U.S. Oct. 26, 2006),.....17, 21

United States v. Long Soldier,
431 F.3d 1120 (8th Cir. 2005).....21

United States v. Mateo,
179 Fed. App'x 64 (1st Cir. 2006).....22

United States v. Meyer,
452 F.3d 998 (8th Cir. 2006), *petition for cert. filed*, No. 06-8085 (U.S. Nov. 27, 2006) 21

United States v. Santos Monroy,
135 Fed. App'x 190 (10th Cir. 2005) 27

United States v. Sitting Bear,
436 F.3d 929 (8th Cir. 2006) 21

United States v. Vampire Nation,
451 F.3d 189 (3d Cir. 2006) 20, 23, 25

United States v. Walker,
447 F.3d 999 (7th Cir. 2006) 21

United States v. Wallace,
461 F.3d 15 (1st Cir. 2006) 22

CONSTITUTIONAL PROVISIONS

U.S. Const. art. V 4

STATUTES

18 U.S.C. § 3553(a) ..... *passim*

28 U.S.C. § 1254(1) 1

RULES

Fed. R. Crim. P. 32 ..... *passim*

OTHER AUTHORITIES

Mem. from Hon. Susan C. Bucklew, Chair, Advisory Committee on Criminal Rules to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 3 (May 20, 2006), http://www.uscourts.gov/rules/Reports/CR052006.pdf 29

Mem. from Hon. Susan C. Bucklew, Chair, Advisory Committee on Criminal Rules to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 2 (Dec. 18, 2006), http://www.uscourts.gov/rules/Reports/CR12-2006.pdf 29

Pending Rule Amendments, http://www.uscourts.gov/rules/newrules6.htm 29

Researching Rules Amendments: Minutes of Committee Meetings, http://www.uscourts.gov/rules/minutes.htm; *Meetings and Hearings*, http://www.uscourts.gov/rules/newrules2.html 29

The Rulemaking Process: A Summary for the Bench and Bar: The Federal Rules of Practice and Procedure, Apr. 2006, http://www.uscourts.gov/rules/proceduresum.htm 30

The Rulemaking Process: Judicial Conference Procedures: Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, http://www.uscourts.gov/rules/procedurejc.htm 29

U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, "Fiscal Year 2006 Guidelines Sentences National Data," http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm 26

U.S. Sentencing Guidelines Manual (2006) 23

PETITION FOR A WRIT OF CERTIORARI

Petitioners Omar Mejia-Huerta, Anastacio Pantoja-Arellano, Jose Andres Dehuma-Suarez, Antonio Cruz-Martinez, Luis Estrada, and Tabrodrick Deshaun Craddock ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is available at 2007 WL 610973 and is reprinted in the Appendix to the Petition ("App.") at 1a-18a. No petitions for rehearing were filed. The final judgments of the district court for all petitioners are unreported and are reprinted in the Appendix at App. 42a-76a. The district court's written orders responding to the sentencing objections of three petitioners are unreported and are reprinted in the Appendix at App. 19a-41a.

JURISDICTION

The court of appeals issued its decision affirming all of the challenged sentences on February 28, 2007. App. 1a-2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 32(h) provides:

> Notice of Possible Departure From Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

18 U.S.C. § 3553(a) provides:

> (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for –
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to

be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

A. Legal Background

1. Federal Rule of Criminal Procedure 32 provides an integrated set of sentencing procedures to "provide[] for focused, adversarial development of the factual and legal issues" relevant to a federal criminal defendant's sentence. *Burns v. United States*, 501 U.S. 129, 134 (1991). Those issues are primarily defined by the "Presentence Investigation Report" (or "PSR") that the Rule requires a probation officer to prepare for each defendant. Fed. R. Crim. P. 32(c). The PSR must discuss the defendant's "history and characteristics," calculate the defendant's sentence under the Sentencing Guidelines, and "identify any basis for departing from the applicable sentencing range." Fed. R. Crim. P. 32(d).

Congress then ensured that the parties would have ample notice of the basis for the sentence by allowing the parties time to consider the PSR and make any additional presentencing submissions. Under Rule 32, the parties are entitled to receive the PSR "at least 35 days before sentencing"; the parties have 14 days after receipt of the report to make any objections; and the probation officer must submit the report to the court "[a]t least 7 days before sentencing." Fed. R. Crim. P. 32(e)(2), (f)(1), (g).

Rule 32 thus ensures that there is significant development of the factual and legal basis for a sentence prior to the sentencing hearing itself. Further, at the sentencing hearing, attorneys for both the government and the defense have a right to "comment on the probation officer's determinations and other matters relating to an appropriate sentence." Fed. R. Crim. P. 32(i)(1)(C).

In the face of this extensive preparation for the sentencing, if a district court decides to *sua sponte* choose a sentence outside of the Guidelines – a sentence that has not been foreshadowed in any previous submissions – Rule 32 requires that the court provide notice to the parties. Specifically, it states that a district court "must give the parties reasonable notice" before "depart[ing] from the applicable sentencing range" under the Sentencing Guidelines "on a ground not identified for departure either in the presentence report or in a party's prehearing submission." Fed. R. Crim. P. 32(h). That is the provision at issue in this case.

2. The genesis of Rule 32(h) was *United States v. Burns*, 501 U.S. 129 (1991). In that case, this Court considered whether a criminal defendant was entitled to any notice before a district court *sua sponte* imposed a sentence outside of the Sentencing Guidelines. *Id.* at 131. The Court looked to the then-current version of Rule 32, which included substantially the same requirements as it does now, including the requirement that a probation officer prepare a PSR; that the parties receive notice of the PSR and be allowed to make objections; and that the parties have a right "to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." *Id.* at 134 (quoting Rule 32(a)(1)). (Rule 32, at that time, did not include an explicit notice requirement for *sua sponte* departures by district courts.)

The Court considered the text and purposes of Rule 32 and concluded that the parties do have a right to notice before a district court *sua sponte* departs from the Sentencing Guidelines range. As the Court noted, "Rule 32 contemplates full adversary testing" of issues relevant to sentencing, and it "mandates that the parties be given 'an opportunity to comment'" to further that end. *Id.* at 135 (quoting Rule 32(a)(1)). In the Court's view, it would "make[] no sense to impute to Congress an intent that a defendant have the right

to comment on the appropriateness of a *sua sponte* departure but not the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135-36. Indeed, because "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure," "no one is in a position to guess when or on what grounds a district court might depart, much less to 'comment' on such a possibility in a coherent way." *Id.* at 136-37. To the extent that Rule 32 could be read to dispense with notice, that reading should be rejected, the Court stated, because it would raise "the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138.

Moreover, the Court reasoned, notice is required to further "Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues" in sentencing. 501 U.S. at 137. Without notice, parties would be forced to "address possible *sua sponte* departures in a random and wasteful way," for example, "by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative." *Id.* And "defense counsel might be reluctant to suggest" a possible grounds for departure even "for the purpose of rebutting it." *Id.* As a result, "[i]n every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process." *Id.* In light of the text of the Rule and its important purposes, then, the Court held that a district court must "give reasonable notice," "specifically identify[ing] the ground" for departure, before *sua sponte* departing from the Guidelines range. *Id.* at 138-39.

Congress then amended Rule 32, adding subsection (h) to make the holding in *Burns* explicit in the rules. *See* Fed. R. Crim. P. 32 advisory committee's note (2002).

3. In *United States v. Booker*, 543 U.S. 220 (2005), this Court determined that the Constitution requires that the Sen-

tencing Guidelines be considered advisory, rather than mandatory. The Court had previously recognized in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that the Sixth Amendment does not permit a district court to enhance a criminal defendant's sentence by finding facts not charged in the indictment or found by the jury beyond a reasonable doubt. In *Booker*, the Court applied that holding to the Sentencing Guidelines, and it determined that the mandatory nature of the Guidelines was incompatible with the Sixth Amendment's strictures. 543 U.S. at 230-34.

As the Court explained, the Guidelines require district courts to find facts by a preponderance of the evidence to increase a defendant's penalty beyond the maximum sentence that the court could impose based only on the facts found by the jury. *Id.* at 231-32. For that reason, the mandatory Guidelines could not stand. *Id.* at 233-34. The Court then determined that it would best further Congress's intent to "make the Guidelines system advisory," *id.* at 246, where the "Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines," district courts "consult those Guidelines and take them into account while sentencing," while "tailor[ing] the sentence in light of" the factors identified in 18 U.S.C. § 3553(a), *id.* at 245-46, 264.[1]

---

[1] Those factors include: "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, [] to provide just punishment," "to afford adequate deterrence," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment," *id.* at § 3553(a)(2); "the kinds of sentences available," *id.* § 3553(a)(3); "the sentencing range established" by the Guidelines, *id.* § 3553(a)(4); any "any pertinent policy statement" issued by the Sentencing Commission, *id.* § 3553(a)(5); "the need to avoid un-

After *Booker*, then, a sentence need not be confined to the Guidelines range, but may be anywhere within the statutory minimum and maximum, and the appropriateness of the sentence is judged by reference to the factors in 18 U.S.C. § 3553(a).

B. Factual Background and Procedural History

1. Each petitioner was charged with a federal criminal offense and decided to plead gui' y. App. 4a-9a. Although each petitioner was sentenced post-*Booker*,[2] each expected to be sentenced to a term of imprisonment within the Guidelines. Neither petitioners' PSRs nor any sentencing memorandum recommended a sentence above or below the Guidelines. *Id.* at 4a-9a. And the district court gave no prior notice of its intention to depart upward from the Guidelines. As a result, prior to the sentencing hearing, there was nothing that had "indicated the possibility of or reasoning behind the imposition of a non-Guidelines sentence." *Id.* at 4a-9a.

Nevertheless, the district court sentenced each petitioner to a term of imprisonment that was well in excess of the Guidelines range. Indeed, the sentences range from 124% to 444% of the maximum Guidelines sentences. The district court invoked the same reasons for each upward departure. Apparently believing that the defendants' criminal history scores under the Guidelines were non-representative, the district court cited "criminal history" as justifying an upward departure for each of the defendants. App. 4a-8a. The district court also cited each defendant's disrespect for the laws of the United States and potential threat to public safety. *Id.*

---

warranted sentence disparities," *id.* § 3553(a)(6); and "the need to provide restitution," *id.* § 3553(a)(7).

[2] Estrada was originally sentenced pre-*Booker*. App. 8a. The court of appeals vacated his sentence based on *Booker* and remanded for resentencing. *Id.*

Defense counsel was "stunned" by the *sua sponte* departures. Pet'r C.A. Br. 8. Because there had been no notice of any potential departures, defense counsel had no opportunity to prepare evidence or argument to address the factual basis for the district court's statements or (if they facts were as the district court believed) whether they warranted upward departures.

Believing that notice was required by Rule 32(h), and recognizing that he could not successfully challenge the departures without notice, defense counsel sought to preserve the claims of Rule 32(h) error through verbal and written objections. Two of the defendants – Pantoja-Arellano and Cruz-Martinez – verbally objected to the lack of notice at the time of sentencing and filed written objections immediately after sentencing. App. 5a, 7a. One defendant – Dehuma-Suarez – objected to the lack of notice by filing a written objection immediately after sentencing. *Id.* at 6a. One defendant – Estrada – entered a pro forma objection to the lack of notice during sentencing but did not file a written objection. Estrada Tr. 9; *see also* Pet'r C.A. Reply Br. 20-22. The district court responded to each objection by explaining that notice was unnecessary because no evidence or argument could change the court's mind. App. 5a-8a.[3]

a. Anastacio Pantoja-Arellano pleaded guilty to a single count of illegal re-entry after deportation. App. 4a. In his PSR, the probation officer calculated a Sentencing Guidelines range of 33 to 41 months of imprisonment. *Id.* at 4a-5a.

The district court *sua sponte* imposed a sentence of 96 months of imprisonment, a 234% increase over the Sentencing Guidelines maximum, and three years of supervised re-

---

[3] For two defendants – Mejia-Huerta and Craddock – counsel did not object to the sentence. App. 4a, 9a. But, as explained below, these petitioners should prevail even under the plain-error standard. *See infra* p. 25.

lease. *Id.* at 5a. During Pantoja-Arellano's sentencing hearing, his counsel verbally objected to the lack of notice and offered to present additional oral argument or a written objection. *Id.* The district court advised that it preferred a written objection, which defense counsel promptly filed. *Id.* That written objection argued that the district erred in failing to provide notice before *sua sponte* departing from the Guidelines and that the sentence was unreasonable. *Id.*

b. Antonio Cruz-Martinez pleaded guilty to one count of illegal re-entry after deportation. App. 7a. In his PSR, the probation officer calculated a Sentencing Guidelines range of 21 to 27 months of imprisonment. *Id.*

The district court *sua sponte* imposed a sentence of 60 months of imprisonment, a 222% increase over the Sentencing Guidelines maximum, and three years of supervised release. *Id.* During Cruz-Martinez's sentencing hearing, his counsel verbally objected to the lack of notice and offered to present additional oral argument or a written objection. *Id.* As with Pantoja-Arellano, the district court advised that it preferred a written objection, which defense counsel promptly filed. *Id.* at 7a-8a.

c. Jose Dehuma-Suarez pleaded guilty to one count of illegal re-entry after deportation. App. 6a. In his PSR, the probation officer calculated a Sentencing Guidelines range of 21 to 27 months of imprisonment. *Id.*

The district court *sua sponte* imposed a sentence of 120 months of imprisonment, a 444% increase over the Sentencing Guidelines maximum, and three years of supervised release. *Id.* Dehuma-Suarez filed a written objection to the lack of notice immediately following the sentencing. *Id.*

d. Luis Estrada pleaded guilty to a single count of transporting illegal aliens. App. 8a. In his PSR, the probation officer calculated a Sentencing Guidelines range of 33 to 41 months of imprisonment. *Id.* The district court sustained

Estrada's objection to a two-point enhancement and lowered that range to 27 to 33 months of imprisonment. *Id.*

The district court *sua sponte* imposed a sentence of 41 months of imprisonment, a 124% increase over the Sentencing Guidelines maximum, and three years of supervised release. *Id.* Estrada's counsel made a verbal pro forma objection to the lack of notice, but did not file a written objection. Estrada Tr. 4, 7, 9; Pet'r C.A. Reply Br. 20-22.[4]

e. Omar Mejia-Huerta pleaded guilty to a single count of illegal re-entry after deportation. App. 4a. In his PSR, the probation officer calculated a Sentencing Guidelines range of 9 to 15 months of imprisonment. *Id.*

The district court *sua sponte* imposed a sentence of 36 months of imprisonment, a 140% increase over the Sentencing Guidelines maximum, followed by three years of supervised release. *Id.* Mejia-Huerta did not object to the lack of notice before the district court. *Id.*

f. Tabrodrick Deshaun Craddock pleaded guilty to a single count of possessing a firearm while a felon. App. 9a. In his PSR, his probation officer calculated a Sentencing Guidelines range of 21 to 27 months of imprisonment. *Id.*

The district court *sua sponte* imposed a sentence of 60 months of imprisonment, a 222% increase over the Sentencing Guidelines maximum, and three years of supervised release. *Id.* Craddock did not object to the lack of notice before the district court. *Id.*

---

[4] The court of appeals determined that Estrada failed to timely object and his sentence thus should only be reviewed for plain error. App. 11a. The record reveals, however, that the district court had considered defense counsel's notice argument with respect to several other defendants that day, Estrada Tr. 4, 7, and defense counsel made the district court aware of the fact that Estrada had the same objection to his sentence, *id.* at 9. In any event, Estrada should prevail even under the plain-error standard. *See infra* p. 25.

The district court filed three written orders that set forth its view that the Rule 32(h) notice requirement does not survive *Booker*.[5] The court first suggested that each defendant actually had "notice" because he knew the statutory maximum sentence and "the Plea Memorandum put Defendant on notice that this Court was free to exercise its discretion and sentence him outside of the recommended Guidelines range." App. 27a; *see also id.* at 21a, 36a. It further reasoned that, in any event, notice is no longer required after *Booker* because a district court "may, in its discretion, impose a sentence outside of the Guidelines range," and "[i]f such discretion is to have any meaning at all, a court should be allowed during the sentencing hearing to determine that the recommended Guidelines range is insufficient." *Id.* at 28a; *see also id.* at 22a, 37a. In the court's view, "variances" from the Guidelines post-*Booker* are different from "departures" from the Guidelines pre-*Booker*, and Rule 32(h) applies only to the latter: "Rule 32(h)'s notice requirement is now unnecessary because any defendant being sentenced is no longer required to be sentenced at a pre-set mandatory range – a range that a defendant would have expected and relied upon." *Id.* at 30a; *see also id.* at 39a.

2. Petitioners each appealed, and their appeals were consolidated. The court of appeals affirmed all of the sentences. In so doing, it rejected the argument that, after *Booker*, Federal Rule of Criminal Procedure 32(h) continues to require that a district court provide notice to the parties before *sua sponte* imposing a sentence above or below the Guidelines range. App. 14a-15a, 18a.

The court of appeals recognized that "Rule 32(h) was a legislative response to the Supreme Court's decision in *Burns*." *Id.* at 12a. *Burns* had held that the then-current ver-

---

[5] These orders were for defendants Pantoja-Arellano (App. 19a-23a), Cruz-Martinez (App. 24a-32a), and Dehuma-Suarez (App. 33a-41a).

sion of Rule 32 required notice before a *sua sponte* departure from the Guidelines. *Burns* recognized that without a notice requirement, "a litigant would unfairly have (1) to engage in an incoherent comment and defense at sentencing; (2) in a pre-sentencing filing, to waste large amounts of time guessing when or on what grounds a court might depart *sua sponte*; or (3) to suggest reluctantly a departure possibility to the sentencing court in a pre-sentencing filing, only for the purpose of rebutting the possible departure grounds." *Id.*

But, as the court of appeals noted, the Supreme Court's decision in *Booker* changed the import of the Sentencing Guidelines. Before *Booker*, "sentencing courts were compelled to impose sentences that fell within the sentencing ranges assigned by the Guidelines, unless a specified exception existed," in which case the district court could invoke the exception for an "upward or downward departure" from the Guidelines. *Id.* at 13a. After *Booker*, "a sentencing court may impose a sentence either higher or lower than – at variance with – the appropriate Guidelines range" after calculating the Guidelines range and "us[ing] it as a frame of reference." *Id.* "If the sentencing court chooses to impose a non-Guidelines sentence, its reasons for doing so must be consistent with the facts enumerated in § 3553(a)." *Id.*

The court of appeals then noted that "an incongruent pattern of caselaw has developed" in the federal courts of appeals about "whether *Burns* or Rule 32(h) continue to apply to non-Guidelines sentences" after *Booker*, with the Second, Fourth, Ninth, and Tenth Circuits finding that notice is still required, and the Third, Seventh, Eighth, and Eleventh Circuits finding that it is not. App. 14a. And it specifically noted that "[t[he government *agrees* with the defendants that the district court . . . was required to provide pre-sentencing notice." *Id.* at 10a (emphasis added). "Enter[ing] the fray," the Fifth Circuit held that notice is not required. *Id.* at 14a-15a.

The court of appeals provided two justifications for its conclusion. First, it stated that a pre-*Booker* non-Guidelines sentence – a "departure" from the mandatory Guidelines – is of a different sort than a post-*Booker* non-Guidelines sentence – which it deemed a "variance." *Id.* at 13a-15a. Because "the plain language of Rule 32(h) limits its application to *departures*," the court determined that it was "bound to hold that Rule 32(h) applies to *departures* only and not to *variances* from the Guidelines." *Id.* at 15a.

Second, the court determined that "the concerns that precipitated the Court's decision in *Burns* are no longer viable" under an advisory Guidelines regime. *Id.* Because sentencing courts must base their sentences on "the full host of factors set forth in § 3553(a)," and "[t]hese factors are known (or knowable) by the parties prior to sentencing," litigants are "on notice that a sentencing court has discretion to consider any of these factors." *Id.* That notice, in the court of appeals' view, "eliminates the element of unfair surprise, the concern that defense counsel will waste time with a presentencing filing, the possibility that defense counsel will unwittingly provide the district court with a grounds for departure, and the worry of possibly undermining the adversarial process." *Id.*

Having found that no notice was required under Rule 32(h), the court of appeals then affirmed with respect to each defendant. *Id.* at 15a-18a.

REASONS FOR GRANTING THE PETITION

In this case, a single district court judge imposed on each of six criminal defendants a sentence far in excess of the maximum sentence under the Sentencing Guidelines. For each defendant, a detailed PSR was prepared, and the PSR did not recommend any departure above or below the Guidelines range. Nor did the prosecution or defense counsel suggest any sentence outside the Guidelines. Yet the district court judge imposed a sentence above the Guidelines without

providing the parties any notice or opportunity to address the grounds for departure.

The district court's *sua sponte* imposition of sentences outside of the Guidelines raises an important question on which the federal courts of appeals are evenly split: whether the notice requirement in Federal Rule of Criminal Procedure 32(h) survives this Court's decision in *United States v. Booker*, 542 U.S. 220 (2005). Prior to *Booker*, it was well-settled that notice was required: this Court found in *Burns* that a prior version of Rule 32 required notice in order to give effect to a defendant's right to comment at sentencing, and Congress subsequently made that notice requirement explicit in subsection (h) of the Rule. But after *Booker*'s holding that the Sentencing Guidelines are no longer mandatory, five circuits have held that the advisory nature of the Guidelines makes the concept of a "departure" from the Guidelines less meaningful, so that the notice is no longer necessary. On the other side, five circuits have held that the rationale of *Burns* and Rule 32(h) continues to apply and that notice is required.

This case provides an ideal vehicle in which to resolve that pronounced and mature circuit split. The sentencing hearings of the six defendants in this case starkly illustrate the effects of lack of notice. Both the prosecutor and defense counsel were surprised by the district court's *sua sponte* departure from the Guidelines, and as a result there was no meaningful discussion or adversarial testing of the bases for the departures.

Further, the time to resolve this circuit split is now. This split developed quickly after *Booker*, and it has serious practical effects, particularly in those circuits which do not require notice. Although this Court is current revisiting the question of the weight to be placed on the Guidelines in *Rita v. United States* and *Claiborne v. United States*, the resolution of this case does not depend on those cases. So long as

the Guidelines sentence remains a factor to be considered in sentencing – which it must, under 18 U.S.C. § 3553(a)(4) and (a)(5) – a departure from the Guidelines sentence is meaningful and Rule 32(h)'s notice requirement should apply. And this Court should not hold off on deciding this issue in the hopes that the Judicial Conference will amend Rule 32(h), for the soonest such an amendment could become effective is December 2010. The issue raised in this case cannot wait, especially in light of the numerous practical consequences of the deep circuit split.

I. THERE IS AN ACKNOWLEDGED, DEEP CIRCUIT SPLIT ON THE QUESTION WHETHER RULE 32(H)'s NOTICE REQUIREMENT SURVIVES *BOOKER*.

The decision below presents a critical issue on which the government agrees there is a deep circuit split: whether Rule 32(h)'s requirement that a district court provide both parties with reasonable notice before *sua sponte* imposing a sentence outside the Sentencing Guidelines survives *Booker*.

The Second, Fourth, Sixth, Ninth, and Tenth Circuits have held that notice is required under Rule 32(h) post-*Booker*. The Third, Seventh, Eighth, and Eleventh Circuits – as well as the Fifth Circuit below – have held that no notice is required. The courts of appeals have repeatedly acknowledged this split. And the government has explicitly stated in cases in several of the federal courts of appeals that it believes that the notice requirement survives *Booker*.

The depth and balance of the split shows the need for this Court to resolve the question presented. And the speed with which the split developed post-*Booker* shows the importance of resolving it promptly. This Court should grant review and hold that Rule 32(h) requires notice before a district court *sua sponte* imposes a sentence outside of the Guidelines.

1. There is a 5-5 circuit split on the question of the effect of *Booker* on Rule 32(h)'s notice requirement. This split in authority described above has been repeatedly acknowledged by the federal courts of appeals. *See, e.g., United States v. Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007); *United States v. Cousins*, 469 F.3d 572, 579 (6th Cir. 2006); *United States v. Irizarry*, 458 F.3d 1208, 1212 & n.4 (11th Cir. 2006), *petition for cert. filed*, No. 06-7517 (U.S. Oct. 26, 2006); *United States v. Anati*, 457 F.3d 233, 236 (2d Cir. 2006).

a. Five circuits have determined that the notice requirement applies to any sentence above or below the now-advisory Guidelines. Those courts generally look to the text of the Rule, which evidences a clear intent to require notice for a non-Guidelines sentence, and to the purposes of the Rule, which are to ensure full and fair adversarial testing of issues relevant to sentencing.

For example, in *United States v. Anati*, the Second Circuit upheld the notice requirement because "the same reasoning that persuaded the Supreme Court [in *Burns*] to apply the comment opportunity . . . to *sua sponte* departures under the mandatory Guidelines regime" applies to a "non-Guidelines sentence under the advisory Guidelines regime." 457 F.3d at 236. The court of appeals noted the "significant similarity between an intent to depart and an intent to impose a non-Guidelines sentence" because "[b]oth forms of sentencing start with a calculated Guidelines range." *Id.* at 236-37 (citing 18 U.S.C. § 3553(a)(4)). Although district courts now have a "somewhat broader opportunity" than before "to sentence above or below that range based on . . . the factors outlined in section 3553(a)," the fact that the Guidelines range remains the starting point for sentencing makes notice before imposition of a *sua sponte* non-Guidelines sentence important. *Id.* at 237. Indeed, notice facilitates the important goal of ensuring full "adversarial testing of factual and legal considerations relevant to sentencing," because although a dis-

trict court's "obligation to consider section 3553(a) factors is known in advance of sentencing," "application of those factors turns on relevant facts, some of which might be in the Court's mind" and will not be subject to adversarial testing if left undisclosed. *Id.*

Similarly, in *United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006), the Fourth Circuit agreed that a criminal defendant is entitled to notice when a district court is "contemplating a sentence above the advisory guideline range." It noted that Rule 32 "contains various procedural requirements intended to ensure the accuracy of the information used at sentencing," one of which is the notice requirement in subsection (h). *Id.* In the court of appeals' view, "[t]he need for such notice is as clear now as before *Booker*." *Id.* As the court explained, now, as in *Burns*, "[t]here is 'essentially no limit on the number of potential factors that may warrant a departure' or a variance, and neither the defendant nor the Government 'is in a position to guess when or on what grounds a district court might depart' or vary from the guidelines." *Id.* (quoting *Burns*, 501 U.S. at 136-37). Therefore, "notice of an intent to depart or vary from the guidelines remains a critical part of sentencing post-*Booker*." *Id.*

In *United States v. Cousins*, 469 F.3d 572 (6th Cir. 2006), the Sixth Circuit also held that notice is required for non-Guidelines sentences after *Booker* and that the failure to provide notice constitutes plain error. The court of appeals reasoned that Rule 32(h) "applies equally" to "departures" under the mandatory Guidelines and to "variances" from the Guidelines range under the advisory Guidelines regime. *Id.* at 580. The court found "persuasive the reasoning of the circuits that continue to apply Rule 32(h) to all sentences that deviate from the Guidelines," and it rejected the arguments of the circuits that do not. *Id.* Specifically, the court rejected the argument that 18 U.S.C. § 3553(a) provides all of the notice to which the parties are entitled: "While it is true that,

after *Booker*, parties may be assumed to know that a district court may impose a variance on the basis of a factor not identified in the PSR or in a party's submission, the same was true of departures before *Booker*" because Chapter 5 of the Guidelines, like § 3553(a), "specifically identifies various factors that a court should take into consideration" in imposing a sentence. *Id.* The court then noted that a district court's failure to comply with Rule 32(h) is a "plain" error, and one that generally affects substantial rights and the fairness of the judicial proceedings because "notice would have permitted [defense] counsel to address the district court's" bases for a non-Guidelines sentence. *Id.* at 580-81.

The Ninth and Tenth Circuits have followed suit. In *United States v. Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006), the Ninth Circuit held that "Rule 32(h) requires that a district court provide notice of its intent to sentence outside the range suggested by the Guidelines suggested by the Guidelines post-*Booker*, as it did pre-*Booker*." It found that the rationale of *Burns* is "unaffected by *Booker*'s mandate that the Guidelines be applied in an advisory fashion" because the district court must still "correctly calculate the [Guidelines] range" and use it as a "starting point" in sentencing. *Id.* (internal quotation marks omitted). "Parties must receive notice" when the court is contemplating an above- or below-Guidelines sentence "in order to ensure that issues with the potential to impact sentencing are fully aired." *Id.*

And in *United States v. Atencio*, 476 F.3d 1099 (10th Cir. 2007), the Tenth Circuit agreed. The court of appeals reasoned that *Booker* "has not affected *Burns*'s mandate for focused, adversarial resolution of the legal and factual bases for sentencing; nor does it negate the benefits of notice in furthering this end." *Id.* at 1104 (internal quotation marks omitted). Although defendants are "constructively on notice of § 3553(a) factors post-*Booker*," they were "equally aware

of the specified circumstances for departure" under the previous mandatory Guidelines regime. *Id.* (internal quotation marks omitted). The purposes of notice are still furthered: it "allows the parties to focus their attention on those considerations most relevant to the sentencing court's decision." *Id. See also United States v. Dozier*, 444 F.3d 1215, 1217-18 (10th Cir. 2006) ("We do not question the viability of Rule 32(h) and *Burns* after *Booker*.").

b. Five circuits have held that no notice is required by Rule 32(h) before a district court imposes a non-Guidelines sentence. Those courts of appeals have generally reasoned that Rule 32(h), by its terms, applies only to "departures," a concept with little meaning post-*Booker*, and § 3553(a) provides sufficient notice of the factors the district court might consider in sentencing.

For example, in *United States v. Vampire Nation*, 451 F.3d 189, 195-96 (3d Cir. 2006), the Third Circuit determined that Rule 32(h)'s notice requirement has no vitality after *Booker*. The court of appeals distinguished between pre-*Booker* "departures" and post-*Booker* "variances," which are "discretionary sentences not based on a specific Guidelines departure provision." *Id.* at 195 n.2. The court held that Rule 32(h) should not apply to "variances," because district courts now "exercise broad discretion in imposing sentences" using the factors identified in 18 U.S.C. § 3553(a), and "[t]hose factors are known prior to sentencing," so that "the element of unfair surprise that *Burns* sought to eliminate is not present." *Id.* at 196 (internal quotation marks omitted). Moreover, the court of appeals reasoned, the Guidelines "are now only one factor among many which can influence a discretionary sentence," and to apply Rule 32(h) to "variances" from the Guidelines would "elevate the advisory sentencing range to a position of importance that it no longer can enjoy." *Id.* Finally, the court of appeals suggested that advance notice would be "unworkable" because "*Booker* does

not contemplate that the court will somehow arrive at its sentence prior to sentencing." *Id.* at 197.

The Seventh Circuit came to the same ultimate conclusion in *United States v. Walker*, 447 F.3d 999 (7th Cir. 2006). There, the court of appeals started with the text of Rule 32(h), noting that it only mentions "departures," and stated that after *Booker*, the concept of "departures" is "obsolete." *Id.* at 1005-06 (internal quotation marks omitted). Instead, a district court "now consults the Guidelines as *guidance* for what is a wholly discretionary decision – discretion that is exercised by reference to the broad array of sentencing factors set forth in § 3553(a)." *Id.* at 1007. In that regime, the concerns animating *Burns* no longer apply because there can be no "unfair surprise" when the "defendants are on notice" that district courts may consider "any of the factors specified in § 3553(a)." *Id.*

And the Eighth Circuit and Eleventh Circuits have likewise held that Rule 32(h)'s notice requirement no longer applies. In *United States v. Long Soldier*, 431 F.3d 1120 (8th Cir. 2005), the Eighth Circuit simply reasoned that Rule 32(h) applies only to "departures," not "variances," and thus no notice is required. *Id.* at 1122. *See also United States v. Meyer*, 452 F.3d 998 (8th Cir. 2006), *petition for cert. filed*, No. 06-8085 (U.S. Nov. 27, 2006); *United States v. Sitting Bear*, 436 F.3d 929, 932-33 (8th Cir. 2006).

Correspondingly, in *United States v. Irizarry*, 458 F.3d 1208 (11th Cir. 2006), *petition for cert. filed*, No. 06-7517 (U.S. Oct. 26, 2006), the Eleventh Circuit found that the notice requirement no longer applies, reasoning that "parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a)." *Id.* at 1212. Thus, "parties cannot claim unfair surprise or inability to present informed comment – the Supreme Court's concerns in *Burns* – when a district court imposes a sentence above the guide-

lines range based on the section § 3553(a) sentencing factors." *Id.*

Finally, in the decision below, the Fifth Circuit adopted the reasoning of the Third, Seventh, Eighth, and Eleventh Circuits, holding that "sentencing courts are not required to give pre-sentencing notice of their *sua sponte* intention to impose a non-Guidelines sentence, regardless of the pre-*Booker* pronouncements of *Burns* and Rule 32(h)." App. 16a. The court reasoned that "the plain language of Rule 32(h) limits its application to *departures*," and "the concerns that precipitated the Court's decision in *Burns* are no longer viable" because post-*Booker* sentencing is "highly discretionary" and the factors upon which a sentence is based are listed in § 3553(a) and thus "known (or knowable) to the parties prior to sentencing," which "eliminates the element of unfair surprise." *Id.* at 15a. *See also United States v. Garza*, 188 Fed. App'x 274, 276 (5th Cir. 2006), *petition for cert. filed*, No. 06-8481 (U.S. Dec. 20, 2006).[6]

2. Although the circuits are split, the answer to the question presented, as the government recognizes, is plain: Rule 32(h) applies to require that the district court provide notice before *sua sponte* imposing any sentence outside of the Guidelines range after *Booker*. This conclusion is compelled by the text and the purposes of the Rule. Moreover, nothing in *Booker* so alters the position of the Guidelines that a variance from them is no longer deserving of notice.

As an initial matter, the text of Rule 32(h) is clear: the district court "must give the parties reasonable notice" before

---

[6] In addition, the First Circuit has held that a district court does not commit plain error when failing to give Rule 32(h) notice before *sua sponte* imposing a non-Guidelines sentence, *see United States v. Mateo*, 179 Fed. App'x 64, 65 (1st Cir. 2006), although it also noted that "it is clearly the better practice – whether or not the legal requirement survives *Booker* – for the court to provide notice," *United States v. Wallace*, 461 F.3d 15, 44 n.14 (1st Cir. 2006).

it "may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission." The term "depart" simply means to impose a sentence outside of the Guidelines range. Indeed, the Sentencing Guidelines Manual defines a "departure" as "imposition of a sentence outside the applicable guideline range." *U.S. Sentencing Guidelines Manual* § 1B1.1 commentary (2006). That broad definition evidences Congress's intent to require notice before any sentence outside of the Guidelines is imposed *sua sponte*.

This Court should reject the logic of those courts that have distinguished between "departures" and "variances" and held that Rule 32(h) applies only to the former. At the time Rule 32 was amended to add subsection (h), the term "variance" had no independent meaning; it is simply a term that some courts have invoked to distinguish between the pre- and post-*Booker* sentencing regimes. *See, e.g.*, *Vampire Nation*, 451 F.3d at 195-96 & n.2. Holding that Rule 32(h) does not apply to non-Guidelines sentences after *Booker* because they are not "departures" elevates form over substance.

Further, the purposes behind Rule 32(h) apply with equal force to sentences outside the Guidelines range both before and after *Booker*. Rule 32(h) is based on the need for "focused, adversarial resolution of the legal and factual issues" relevant to sentencing, which requires that both the prosecution and the defense be allowed an opportunity to present evidence and argument regarding the appropriate sentence. *Burns*, 501 U.S. at 137. Just as before *Booker*, the parties must have notice in order to present argument about the most appropriate sentence under the advisory Guidelines regime. If the district court is permitted to announce a basis for a non-Guidelines sentence and impose that sentence without notice, the parties will be unfairly surprised, and there will be no opportunity for the parties to ensure that the legal and factual bases for the sentence are sound. Indeed, without

notice, there will be just the same "random and wasteful" attempts to anticipate and address *sua sponte* departures contemplated in *Burns*. 501 U.S. at 137.

The fact that 18 U.S.C. § 3553(a) lists a number of factors that the district court must use to choose the appropriate sentence is not an answer to the problem of lack of notice. Section 3553(a) cannot provide the type of "reasonable notice" required to allow the parties to effectively anticipate and address possible departures for the Guidelines, because the factors listed in that section are extremely broad. *See* 18 U.S.C. § 3553(a) (citing, *inter alia*, "the nature and circumstances of the offense," the "history and characteristics of the defendant," "the seriousness of the offense," and the need for "adequate deterrence" and "to protect the public"). Indeed, this Court in *Burns* already effectively rejected the notion that this type of generalized notice is sufficient, for it held that the numerous grounds for departure under the Guidelines were insufficient to provide notice because there was "essentially no limit on the number of potential factors that may warrant a departure" and neither party could reasonably "guess when or on what grounds a district court might depart" from the Guidelines. *Burns*, 501 U.S. at 136-37.

Booker does not suggest that the Guidelines have so little import that notice is no longer required. To the contrary: this Court held in *Booker* that the "Sentencing Commission remains in place" and that district court judges must calculate and consider the Guidelines range as a starting point in sentencing. 543 U.S. at 264. Indeed, notice is even more important post-*Booker*, because the only constraints on a defendant's sentence are the extremely broad factors in § 3553(a) and the statutory minima and maxima and because the sentence is subject to deferential appellate review for "reasonableness." *Id.* at 261. And there is no question that the other portions of Rule 32 continue to apply, requiring the probation office to prepare a PSR and the parties to make

pre-sentencing objections and submissions to guide the sentencing inquiry. In light of the extensive preparation required by the Rule before each sentencing hearing, it would make little sense for that effort all to be undone by a *sua sponte* departure at the sentencing hearing itself.

Moreover, the failure to provide the required notice under Rule 32(h) rises to the level of a "plain" error, for the text of the Rule clearly mandates notice for any *sua sponte* imposition of a non-Guidelines sentence, and the error generally affects a defendant's substantial rights and the fairness and integrity of judicial proceedings because the defendant is provided no meaningful opportunity to challenge the factual and legal bases for the district court's departure from the Guidelines. *See Cousins*, 469 F.3d at 579-81

The government has repeatedly taken the position that Rule 32(h) requires notice even after *Booker* and that to interpret the Rule otherwise would raise serious due process concerns. *See, e.g.*, Pet. App. 10a; *see also, e.g.*, *Anati*, 457 F.3d at 236 n.1; *Vampire Nation*, 451 F.3d at 195; *Evans-Martinez*, 448 F.3d at 1167; *Dozier*, 444 F.3d at 1216, 1218.

In fact, in a letter to the Clerk of the Court of Appeals for the First Circuit, the Chief of the Appellate Section of the Criminal Division at the United States Department of Justice made the Department's position clear:

> Although Rule 32(h) by its terms applies only to "departures" from the Guidelines range, the need for "full adversary testing of the issues relevant" to sentencing, 501 U.S. at 135, continues to apply in the advisory Guidelines system. . . . It would make little sense to require notice of potential departure grounds, while forcing the government and the defendant to "guess when or on what grounds" a district court might deviate from the Guidelines. *Burns*, 501 U.S. at 137. Accordingly, a district court should provide notice to the parties when it is con-

templating a sua sponte deviation (whether upward or downward) from the advisory Guidelines range.

Pet. App. 78a-79a.

II. WHETHER RULE 32(H)'s NOTICE REQUIREMENT SURVIVES *BOOKER* IS AN ISSUE OF URGENT PRACTICAL IMPORTANCE WELL PRESENTED BY THIS CASE

1. The notice issue raised in this case is important, and it has myriad practical consequences for prosecutors and defense counsel alike.

As this Court recognized in *Burns*, notice before a *sua sponte* departure ensures full development of issues relevant to sentencing while ensuring efficient use of resources. *See* 501 U.S. at 135-37. Without notice, both defense counsel and the prosecution must guess at "when [and] on what grounds a district court might depart," and figure out how to respond to those grounds. *Id.* at 136-37. Both would then be forced to attempt to prepare evidence and argument on those hypothetical grounds, a process this Court realized would be "random and wasteful." *Id.* at 137. This process is not only wasteful, but it is likely impossible, in light of the high volume of criminal sentences in the federal district courts. *See, e.g.*, U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, "Fiscal Year 2006 Guidelines Sentences National Data," http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm. And if counsel guessed wrong, they would have effectively no opportunity to mount a response to the grounds that that were actually "in the Court's mind." *Anati*, 457 F.3d at 237.

Importantly, both the government and the defense have a significant interest in the resolution of the issue presented in this case. Both have the potential to suffer from lack of notice, for a district court may *sua sponte* impose either an above-Guidelines sentence or a below-Guidelines sentence.

See, e.g., *Dozier*, 444 F.3d at 1217-18; *United States v. Santos Monroy*, 135 Fed. App'x 190, 193 (10th Cir. 2005). Put another way, "the defendant and the Government enjoy equal procedural entitlements" under Rule 32(h). *Burns*, 501 U.S. at 135 n.4.

The facts of this case illustrate the importance of notice. After the preparation of extensive PSRs for each defendant, the district court stunned both the prosecution and defense counsel by *sua sponte* imposing sentences outside of the Guidelines. These deviations from the Guidelines had acute consequences for the defendants; indeed, one defendant was sentenced to a term of imprisonment that was over 400% greater than expected. *See supra* p. 10. Defense counsel struggled to respond to the departures, while also attempting to preserve the argument that notice was required under Rule 32(h). If defense counsel had been given the "reasonable notice" mandated by Rule 32(h), he could have introduced evidence to rebut the district court's assertions that all of the defendants were dangerous and lacked respect for the laws of the United States and could have addressed whether the criminal history scores from the Guidelines were non-representative. But defense counsel had no such opportunity here.

2. This Court should grant review now. The circuit split here developed extremely quickly after this Court's decision in *Booker*. *Booker* was decided in January 2005. Today, less than two and half years later, ten courts of appeals have issued published decisions on whether *Burns* survives *Booker*. This rapid-fire development of judicial disagreement reflects the incredible frequency with which the notice question arises. This judicial attention also suggests that the issue has great practical consequences for administration of the criminal justice system. With prosecutors and defense counsel alike unsure of how to prepare for sentencing hearings, this Court's prompt intervention is necessary.

There is no need for this Court to wait to resolve this issue until it renders its decisions in *United States v. Rita*, No. 06-5754, and *Claiborne v. United States*, No. 06-5618. Those cases both generally concern what weight should be given to the fact that a sentence is within the Guidelines when that sentence is reviewed by an appellate court for reasonableness.[7] They were argued together on February 20, 2007, and a decision is likely within the next few months. Yet the questions posed in those cases will have no impact on the question presented here. The Guidelines will plainly continue to have some weight in the post-*Booker* regime. *Booker* requires that the Guidelines remain an important touchstone for sentencing, *see* 543 U.S. at 245-46, 264, and 18 U.S.C. § 3553(a)(4) and (a)(5) make the Guidelines range an important factor to be considered in sentencing. Because neither *Rita* nor *Claiborne* will disturb the settled law that Guidelines are an important factor in sentencing, the notice issue will be unaffected by those decisions.

Also, this Court should not delay deciding the question presented here in the hopes that the Judicial Conference will amend Rule 32 to resolve the question. The Judicial Conference had proposed an amendment to Rule 32(h) that would

---

[7] The questions presented in *Rita* are: (1) "Was the district court's choice of within-Guidelines sentence reasonable?" (2) "In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?"; and (3) "If so, can that presumption justify a sentence imposed without an explicit analysis of the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?" 127 S. Ct. 551 (2006).

The questions presented in *Claiborne* are: (1) "Was the district court's choice of a below-Guidelines sentence reasonable?" and (2) "In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?" 127 S. Ct. 551 (2006).

have clarified that, post-*Booker*, notice must be given of a court's previously unidentified grounds for either a departure from the Guidelines or for a non-Guidelines sentence. *See* Mem. from Hon. Susan C. Bucklew, Chair, Advisory Committee on Criminal Rules to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 3 (May 20, 2006), http://www.uscourts.gov/rules/Reports/CR052006.pdf. But that amendment will not be enacted for years, if at all, because the Standing Committee on Rules of Practice and Procedure has remanded the proposal to the Advisory Committee on Criminal Rules, which has voted to start the process over and reexamine the amendment. *See* Mem. from Hon. Susan C. Bucklew, Chair, Advisory Committee on Criminal Rules to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 2 (Dec. 18, 2006), http://www.uscourts.gov/rules/Reports/CR12-2006.pdf. This delay means that the soonest any amendment could complete the comment and review process and be enacted is December 1, 2010.[8] Moreover, as was the case with

---

[8] The Advisory Committee meets semiannually and has a meeting in April 2007. *Researching Rules Amendments: Minutes of Committee Meetings*, http://www.uscourts.gov/rules/minutes.htm; *Meetings and Hearings*, http://www.uscourts.gov/rules/newrules2.html. But any Rule 32(h) amendment will not be ready for consideration at the Advisory Committee's April 2007 semiannual meeting. E-mail from Timothy Dole, Attorney Advisor, Office of Judges Program, Admin. Office of the U.S. Courts, to Susan Moss, O'Melveny & Myers (Mar. 19, 2007). Because Rule 32(h) is not on the agenda for the April meeting, it cannot obtain Advisory Committee approval to be ready for publication in August 2007, the month that new rules are usually published for comment. *See Pending Rule Amendments*, http://www.uscourts.gov/rules/newrules6.htm. That means August 2008 is the soonest any amendment could be published. And even if that happened, there would be a six-month period for public comment which would not end until February 2009. *See The Rulemaking Process: Judicial Conference Procedures: Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*, http://www.uscourts.gov/rules/procedurejc.htm. Then the Advisory Committee would have to review any comments and give final approval,

the Rule amendments post-*Burns*, the ordinary course is for the rule to be amended to conform with this Court's decision. In any event, resolution of the important issue presented in this case cannot wait.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD ANDERSON
(*Counsel of Record*)
JERRY V. BEARD
FEDERAL PUBLIC
DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 Taylor Street, Suite 9A10
Fort Worth, Texas 76102
(817) 978-2753

WALTER DELLINGER
MARK S. DAVIES
NICOLE A. SAHARSKY
SUSAN M. MOSS*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

* *Admitted in Idaho only*

April 18, 2007

---

then the Standing Committee, Judicial Conference, and Supreme Court would each have to give approval in turn, and finally Congress would have seven months to act on the amendment. *The Rulemaking Process: A Summary for the Bench and Bar: The Federal Rules of Practice and Procedure*, Apr. 2006, http://www.uscourts.gov/rules/proceduresum.htm. Assuming no Congressional action to bar enactment and no delay or expedition of the amendment, it would take effect on December 1, 2010.

APPENDIX

APPENDIX A

COURT OF APPEALS OPINION

United States Court of Appeals, Fifth Circuit

* * * * *

UNITED STATES of America, Plaintiff-Appellee

v.

Omar MEJIA-HUERTA, also known as Omar Huerta-Mejia, also known as Omar Mejia, also known as Omar Huerta, also known as Ivan Mexia-Huerta, also known as Omar Mexia, Defendant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Anastacio Pantoja-Arellano, also known as Andy Pantoja, also known as Armando Puentes-Herrera, also known as Pedro Garcia-Rodriguez, Defendant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Jose Andres Dehuma-Suarez, Defendant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Antonio Cruz-Martinez, Defendant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Luis ESTRADA, Defendant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Tabrodrick Deshaun Craddock, Defendant-Appellant.

Nos. 05-11391, 06-10004, 06-10082, 06-10099, 06-10142 and 06-10211.

Feb. 28, 2007.

* * * * *

Susan B. Cowger (argued), Dallas, TX, Jeffrey Robert Haag, Lubbock, TX, for U.S.

Jerry V. Beard (argued), Sherylynn Ann Kime-Goodwin, Asst. Fed. Pub. Defenders, David E. Sloan, Lubbock, TX, for Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas.

Before JONES, Chief Judge, and WIENER, and BARKSDALE, Circuit Judges.

WIENER, Circuit Judge:

This consolidated appeal involves six defendants, each of whom challenges his sentence. All of the sentences were imposed by the same district judge. Defendant-Appellants Omar Mejia-Huerta, Anastacio Pantoja-Arellano, Jose Andres Dehuma-Suarez, and Antonio Cruz-Martinez were convicted of illegal re-entry after deportation, in violation of 8 U.S.C. § 1326. Defendant-Appellant Luis Estrada was

convicted of transporting aliens, in violation of 8 U.S.C. § 1324. Defendant-Appellant Tabrodrick Deshaun Craddock was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Of the six, only one – Estrada – was sentenced before *United States v. Booker*,[1] but, post-*Booker*, his case was remanded for re-sentencing. All the sentences were imposed between early December 2005 and early February 2006.

Although nothing in the government's pre-sentencing submissions or the probation officers' Pre-Sentence Investigation Reports ("PSR") recommended or mentioned any grounds for sentencing departures or variances, the district court in each case – without providing pre-sentencing notice of its intent to do so – imposed a non-Guidelines sentence greater than the Guidelines range indicated. Finding *Burns v. United States*[2] and the plain language of Federal Rule of Criminal Procedure 32(h) inapplicable to post-*Booker* sentences at variance with the Guidelines,[3] we conclude that, post-*Booker*, a sentencing court need not provide pre-sentencing notice of its *sua sponte* intention to impose a non-Guidelines sentence and affirm the district court in all respects.

---

[1] 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

[2] 501 U.S. 129, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991).

[3] Rule 32(h) states:

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

Fed. R. Crim. Proc. 32(h).

I. *FACTS AND PROCEEDINGS*

A. *Omar Mejia-Huerta*

Mejia-Huerta was indicted for a single count of illegal re-entry after deportation.[4] He pleaded guilty pursuant to a plea agreement. Prior to sentencing, the probation officer prepared a PSR, which calculated Mejia-Huerta's advisory Guidelines range at 9 to 15 months imprisonment.

The district court sentenced Mejia-Huerta to a non-Guidelines sentence of 36 months imprisonment followed by three years supervised released. Before imposing the sentence and after considering the sentencing objectives of 18 U.S.C. § 3553(a), the district court stated that Mejia-Huerta's extensive criminal history, disrespect for the laws of the United States, and threat to public safety warranted an "upward variance."[5] Prior to sentencing, neither the district court nor the PSR, or any pre-sentencing submission by the government, indicated the possibility of or reasoning behind the imposition of a non-Guidelines sentence. Mejia-Huerta did not object to the sentence, but timely filed a notice of appeal.

B. *Anastacio Pantoja-Arellano*

Pantoja-Arellano was indicted for a single count of illegal re-entry after deportation.[6] He pleaded guilty pursuant to a plea agreement. Prior to sentencing, the probation officer

---

[4] 8 U.S.C. § 1326.

[5] Mejia-Huerta had two prior convictions for driving while intoxicated, two prior convictions for improper entry by an illegal alien, a single conviction for interfering with public duties of Emergency Medical Services officials, and arrests for making a false claim of U.S. citizenship, possession and use of an inhalant, driving while intoxicated, evading arrest, and tampering with a government document.

[6] *Id.*

prepared a PSR, which calculated Pantoja-Arellano's advisory Guidelines range at 33 to 41 months imprisonment.

The district court sentenced Pantoja-Arellano to a non-Guidelines sentence of 96 months imprisonment followed by three years supervised released. Before imposing the sentence and after considering the sentencing objectives of § 3553(a), the district court stated that Pantoja-Arellano's extensive criminal history, disrespect for the laws of the United States, and threat to public safety warranted an "upward variance."[7] Prior to sentencing, neither the district court nor the PSR, or any pre-sentencing submission by the government, indicated the possibility of or reasoning behind the imposition of a non-Guidelines sentence.

At the conclusion of the sentencing hearing, Pantoja-Arellano's counsel objected to the upward variance and asked the district court if it preferred to consider the objection by oral argument at present or subsequently in writing. The district court advised Pantoja-Arellano to file a subsequent written objection.

In the post-sentencing written objection, Pantoja-Arellano's counsel complained that the district court erred in failing to give him notice of its intent to make a variance; that the variance did not comply with § 4A1.3 of United States Sentencing Guidelines ("U.S.S.G."); and that the sentence was unreasonable. The district court denied the motion and stated that, even if it were to grant the motion and resentence Pantoja-Arellano, it would impose the same sentence. Pantoja-Arellano timely filed a notice of appeal.

---

[7] Pantoja-Arellano had three prior convictions for driving while intoxicated, two prior convictions for illegal re-entry, two prior convictions for aiding and abetting transportation of illegal aliens, two prior convictions for assaults causing bodily injury to family members, a single prior drug offense conviction, and additional convictions that were not specifically identified by the district court at sentencing.

C. *Jose Andres Dehuma-Suarez*

Dehuma-Suarez was indicted for a single count of illegal re-entry after deportation, to which he pleaded guilty pursuant to a plea agreement.[8] Prior to sentencing, the probation officer prepared a PSR, which calculated Dehuma-Suarez's advisory Guidelines range at 21 to 27 months imprisonment.

The district court sentenced Dehuma-Suarez to a non-Guidelines sentence of 120 months imprisonment followed by three years supervised released. Before imposing the sentence and after considering the sentencing objectives of § 3553(a), the district court stated that Dehuma-Suarez's extensive criminal history, disrespect for the laws of the United States, and threat to public safety warranted an "upward variance."[9] Prior to sentencing, neither the district court nor the PSR, or any pre-sentencing submission by the government, indicated the possibility of or reasoning behind the imposition of a non-Guidelines sentence.

Despite not voicing an objection at the sentencing hearing, Dehuma-Suarez filed a post-sentencing objection to the upward variance later that day, making the same claims as Pantoja-Arellano. In response, the district court denied the motion and stated the same observation that it had made in Pantoja-Arellano's case: it would impose the same sentence, even if Dehuma-Suarez's motion was meritorious. Dehuma-Suarez timely filed a notice of appeal.

---

[8] *Id.*

[9] Dehuma-Suarez had four prior convictions for driving while intoxicated and a single conviction for assault on a peace officer, and was arrested and charged with sexual assault of a 14-year-old female child. In addition, Dehuma-Suarez had been deported twice and subsequently reentered the United States both times.

D. *Antonio Cruz-Martinez*

Cruz-Martinez was indicted for a single count of illegal re-entry after deportation, and pleaded guilty pursuant to a plea agreement.[10] Prior to sentencing, the probation officer prepared a PSR, which calculated Cruz-Martinez's advisory Guidelines range at 21 to 27 months imprisonment.

The district court sentenced Cruz-Martinez to a non-Guidelines sentence of 60 months imprisonment followed by three years supervised released. Before imposing the sentence, the district court stated as it had in the other cases consolidated with this one, that, after considering the sentencing objectives of § 3553(a), Cruz-Martinez's extensive criminal history, disrespect for the laws of the United States, and threat to public safety warranted an "upward variance."[11] Prior to sentencing, neither the district court nor the PSR, or any pre-sentencing submission by the government, indicated the possibility of or reasoning behind the imposition of a non-Guidelines sentence.

At the conclusion of the sentencing hearing, Cruz-Martinez's counsel objected to the upward variance and asked the district court if it preferred to consider the objection by oral argument at present or subsequently in writing. The district court advised Cruz-Martinez to file a subsequent written objection.

In the post-sentencing written objection, Cruz-Martinez's counsel objected to the upward variance for the same reasons espoused by Pantoja-Arellano and Dehuma-Suarez. Making

---

[10] *Id.*

[11] Cruz-Martinez had two prior convictions for driving while intoxicated, a single prior conviction for assault causing bodily injury, which was committed on his wife and children, and three prior illegal re-entries into the United States. During one incident of driving while intoxicated, Cruz-Martinez had an unrestrained 7-month-old child in the vehicle with him.

the same observations as it had in those cases, the district court denied the motion and stated that it would impose the same sentence, even if Cruz-Martinez's motion was meritorious. Cruz-Martinez timely filed a notice of appeal.

E. *Luis Estrada*

Estrada was indicted for a single count of transporting illegal aliens.[12] He pleaded guilty pursuant to a plea agreement and was sentenced pre-*Booker*. On appeal, we vacated his sentence for *Booker* error and remanded.[13]

Prior to resentencing, the probation officer prepared a PSR, which calculated Estrada's advisory Guidelines range at 33 to 41 months imprisonment. The district court lowered Estrada's Guidelines range after sustaining an objection to a two-point enhancement. As a result, Estrada's Guidelines range was 27 to 33 months imprisonment. The district court nevertheless resentenced Estrada to a non-Guidelines sentence of 41 months imprisonment followed by three years supervised release. Before imposing the sentence and after considering the sentencing objectives of § 3553(a), the district court stated that Estrada's disrespect for the laws of the United States and threat to public safety warranted an "upward variance."[14] Prior to sentencing, neither the district court nor the PSR, or any pre-sentencing submission by the government, indicated the possibility of or reasoning behind the imposition of a non-Guidelines sentence. Estrada did not object to the sentence, but did timely file a notice of appeal.

---

[12] *Id.* § 1324(a)(1)(A)(ii).

[13] *United States v. Estrada*, 153 Fed. Appx. 265, 266-67 (5th Cir. 2005).

[14] Estrada was transporting 17 illegal aliens in his vehicle and his co-defendant was transporting 10 additional illegal aliens in his vehicle. The district court concluded that these facts alone justified the upward variance.

F. *Tabrodrick Deshaun Craddock*

Craddock was indicted for a single count of being a felon in possession of a firearm.[15] He pleaded guilty pursuant to a plea agreement. Prior to sentencing, the probation officer prepared a PSR, which calculated Craddock's advisory Guidelines range at 21 to 27 months imprisonment.

The district court sentenced Craddock to a non-Guidelines sentence of 60 months imprisonment followed by three years supervised released. Before imposing the sentence and after considering the sentencing objectives of § 3553(a), the district court stated that Craddock's history of violent criminal behavior, his threat to public safety, the need to provide adequate punishment, and the need to promote respect for the law warranted an "upward variance."[16] Prior to sentencing, neither the district court nor the PSR, or any pre-sentencing submission by the government indicated the possibility of or reasoning behind the imposition of a non-Guidelines sentence. Craddock did not object to the sentence, but did timely file a notice of appeal.

II. *LAW AND ANALYSIS*

On appeal, all six defendants assert two identical arguments: (1) The district court erred when it failed to provide

---

[15] 18 U.S.C. § 922(g)(1).

[16] Craddock had prior convictions for assault in which he assaulted his mother and two younger siblings (ages twelve and thirteen, respectively), evading arrest, and unauthorized use of a motor vehicle, in which he led law enforcement officers on a chase throughout Lubbock, Texas and was only apprehended after crashing the vehicle into a utility pole. Furthermore, during the occasion of one of Craddock's arrests, law enforcement officers entered the residence where Craddock was located and observed Craddock brandishing a pistol. Craddock charged the officers, engaging in a fight with one of them. Craddock continued to fight with this officer until subdued by a taser. In addition, an analysis of spent rounds from the pistol in Craddock's possession indicated that it had been used one week earlier in a home-invasion robbery.

pre-sentencing notice of its *sua sponte* intention to impose a non-Guidelines sentence, thereby violating *Burns* and Rule 32(h); and (2) the district court erred when it failed to follow the sentencing methodology set forth in U.S.S.G. § 4A1.3. In addition, Mejia-Huerta, Pantoja-Arellano, Dehuma-Suarez, and Cruz-Martinez contend that the district court erroneously treated each of their prior aggravated felony convictions as sentence-enhancing factors, rather than as substantive elements pursuant to 8 U.S.C. § 1326(b).

The government agrees with the defendants that the district court was required by the rationale of *Burns* and Rule 32(h) to provide pre-sentencing notice of its *sua sponte* intention to impose a non-Guidelines sentence. The government contends that this notice will insure a more focused and adversarial proceeding, and will avoid any due process implications.

Notwithstanding its position, the government asserts that the district court's failure to provide pre-sentencing notice of its *sua sponte* intention to impose a non-Guidelines sentence does not constitute reversible error. As to Pantoja-Arellano, Dehuma-Suarez, and Cruz-Martinez, the government asserts that our review is for harmless error and, because the district court explicitly acknowledged that, even if it had provided pre-sentencing notice of its *sua sponte* intention to impose a non-Guidelines sentence, it would have imposed the same sentence, any error was harmless. As to Mejia-Huerta, Estrada, and Craddock, the government contends that review is for plain error and, because there is no binding, pre-existing law on this issue, any error was not plain.

A. *Standard of Review*

Having timely objected, Pantoja-Arellano's, Dehuma-Suarez's,[17] and Cruz-Martinez's claims are reviewed for

---

[17] It is questionable whether Dehuma-Suarez timely raised an objection to his sentence, thus implicating the standard of review we apply to

harmless error.[18] Under harmless error review, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."[19] An error affects substantial rights if it affects the outcome of the trial proceedings; conversely, an error is harmless if it does not affect the outcome of the district court proceedings.[20] A sentencing error will be considered harmless if the government can establish beyond a reasonable doubt that the district court would have imposed the same sentence absent the error.[21]

In contrast, we review the claims of Mejia-Huerta, Estrada, and Craddock for plain error, as they failed timely to object to the district court.[22] Under plain error review, we may exercise our discretion to correct a defendant's sentence

---

his claim. Dehuma-Suarez failed to raise a contemporaneous objection during his sentencing hearing, but filed a written objection later that same day. His actions may not have been sufficient to constitute a timely objection, but because his claim fails under both harmless error and plain error review, we need not reach this issue. Instead, we will review Dehuma-Suarez's claim under the more lenient harmless error standard.

[18] *United States v. Walters*, 418 F.3d 461, 463 (5th Cir. 2005).

[19] Fed. R. Crim. Proc. 52(a).

[20] *United States v. Akpan*, 407 F.3d 360, 377 (5th Cir. 2005).

[21] *United States v. Pineiro*, 410 F.3d 282, 286 (5th Cir. 2005).

[22] *United States v. Vargas-Garcia*, 434 F.3d 345, 347 (5th Cir. 2005), *cert. denied*, --- U.S. ---, 126 S. Ct. 1894, 164 L. Ed. 2d 578 (2006). Estrada contends that his claim should be reviewed for harmless error as he properly objected to the imposition of his sentence. We disagree. At the conclusion of Estrada's sentencing, Estrada's counsel stated, "[W]ith the Court's permission, I'll file a written objection on the notice requirement." Nothing more was said concerning the district court's alleged error. In response, the district court approved Estrada's proposed procedure. Estrada, however, failed to file his proposed written objection. Estrada's counsel's single statement was simply insufficient to preserve Estrada's objection. It did not adequately provide the district court with the substance of the objection or an opportunity to cure the perceived error. Thus, Estrada's claim is reviewed for plain error.

if there is: (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings.[23]

B. *Merits*

i. *Rule 32(h) and* Burns

Rule 32(h) was a legislative response to the Supreme Court's decision in *Burns*. There, the Supreme Court held that an earlier version of Rule 32 required a sentencing court to give parties reasonable notice of its intention to depart upwardly *sua sponte* from the appropriate Guidelines range, if the grounds for such a departure were not identified in either the PSR or a pre-sentencing submission by the government.[24] The Court concluded that, to give effect to a defendant's right "to comment upon the probation officer's determination and on other matters relating to the appropriate sentence," advance notice was a prerequisite to a *departure*.[25] Otherwise, reasoned the Court, a litigant would unfairly have (1) to engage in an incoherent comment and defense at sentencing; (2) in a pre-sentencing filing, to waste large amounts of time guessing when or on what grounds a court might depart *sua sponte*; or (3) to suggest reluctantly a departure possibility to the sentencing court in a pre-sentencing filing, only for the purpose of rebutting the possible departure grounds.[26] Rule 32(h) has essentially codified the holding of *Burns*.

---

[23] *United States v. Lewis*, 412 F.3d 614, 616 (5th Cir. 2005).

[24] 501 U.S. at 138-39, 111 S. Ct. 2182.

[25] *Id.* This right was codified in Rule 32(a)(1) at the time of *Burns*, but is now codified in Rule 32(i)(1).

[26] *Id.* at 136-37, 111 S. Ct. 2182. The Court also expressed concern with whether a lack of notice under Rule 32 would violate the Due Process Clause. *Id.* at 138, 111 S. Ct. 2182.

Before *United States v. Booker*, sentencing courts were compelled to impose sentences that fell within the sentencing ranges assigned by the Guidelines, unless a specified exception existed.[27] When a sentencing court found such an exception and exercised its limited discretion to sentence outside the applicable Guidelines range, the court was said to be engaging in a "departure" from the Guidelines.[28] Thus, pre-*Booker*, a sentencing court would either impose a sentence within the properly calculated Guidelines range or impose a Guidelines sentence that included an upward or downward departure.

Since *Booker*, sentencing courts have had a third sentencing option – a non-Guidelines sentence.[29] Under the post-*Booker* advisory Guidelines regime, a sentencing court may impose a sentence either higher or lower than – at variance with – the appropriate Guidelines range.[30] Before doing so, however, the sentencing court must calculate the correct Guidelines range, consider it as advisory, and use it as a frame of reference.[31] If the sentencing court chooses to impose a non-Guidelines sentence, its reasons for doing so must be consistent with the factors enumerated in § 3553(a).[32] Thus, post-*Booker*, a sentencing court may im-

---

[27] 543 U.S. at 259, 125 S. Ct. 738.

[28] *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006).

[29] *United States v. Mares*, 402 F.3d 511, 519 n.7 (5th Cir. 2005), *cert. denied*, --- U.S. ---, 126 S. Ct. 43, 163 L. Ed. 2d 76 (2005).

[30] *Smith*, 440 F.3d at 707.

[31] *United States v. Angeles-Mendoza*, 407 F.3d 742, 746 (5th Cir. 2005).

[32] *Smith*, 440 F.3d at 707. Section 3553(a)'s factors include: the defendant's offense conduct, personal history, and characteristics; the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence to criminal conduct, to protect the public, and to rehabilitate the defendant; the kinds of sentences available; the advisory Guidelines

pose a non-Guidelines sentence, i.e., a "variance", but not a "departure," if it calculates the proper sentencing range and references the broad array of factors set forth in § 3553(a).

Since *Booker*, an incongruent pattern of caselaw has developed among those federal circuits that have considered whether *Burns* or Rule 32(h) continue to apply to non-Guidelines sentences. The Third,[33] Seventh,[34] Eighth,[35] and Eleventh[36] Circuits have answered in the negative; the Second,[37] Fourth,[38] Ninth,[39] and Tenth[40] Circuits have answered in the affirmative. In an unpublished and thus non-binding opinion, we have previously determined that a sentencing court's failure to provide notice of its intention to impose a non-Guidelines sentence post-*Booker* does not constitute plain error, but we have expressly declined to rule on whether such failure constitutes error.[41] We now enter the

---

range and policy statements; the need to avoid unwarranted sentencing disparities; and the need to provide restitution.

[33] *United States v. Vampire Nation*, 451 F.3d 189, 195-98 (3d Cir. 2006), *cert. denied*, --- U.S. ---, 127 S. Ct. 424, 166 L. Ed. 2d 300 (2006).

[34] *United States v. Walker*, 447 F.3d 999, 1005-07 (7th Cir. 2006), *cert. denied* --- U.S. ---, 127 S. Ct. 314, 166 L. Ed. 2d 236 (2006).

[35] *United States v. Egenberger*, 424 F.3d 803, 805-06 (8th Cir. 2005), *cert. denied* --- U.S. ---, 126 S. Ct. 1106, 163 L. Ed. 2d 917 (2006).

[36] *United States v. Irizarry*, 458 F.3d 1208, 1212 (11th Cir. 2006).

[37] *United States v. Anati*, 457 F.3d 233, 236-38 (2d Cir. 2006).

[38] *United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006).

[39] *United States v. Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006).

[40] *United States v. Dozier*, 444 F.3d 1215, 1217-18 (10th Cir. 2006).

[41] *United States v. Dean*, 202 Fed. Appx. 775, 776 (5th Cir. 2006); *cf. United States v. Mateo*, 179 Fed. Appx. 64, 65 (1st Cir. 2006); *United States v. Pettus*, 166 Fed. Appx. 532, 534 (2d Cir. 2006); *United States v.*

fray, agreeing with the circuits that have concluded that neither *Burns* nor Rule 32(h) apply to non-Guidelines sentences and thereby disrupt the equipoise of the circuit split on this issue.

We first note that the plain language of Rule 32(h) limits its application to *departures*. It contains no language even hinting that it might apply elsewhere. We conclude that we are bound to hold that Rule 32(h) applies to *departures* only and not to *variances* from the Guidelines.

In addition, as *Booker* has rendered the Guidelines purely advisory, the concerns that precipitated the Court's decision in *Burns* are no longer viable. Sentencing post-*Booker* is a heavily discretionary exercise. Sentencing courts need only consider the Guidelines as informative and must consult the full host of factors set forth in § 3553(a) before rendering a reasonable non-Guidelines sentence. These factors are known (or knowable) by the parties prior to sentencing, thus putting the litigants on notice that a sentencing court has discretion to consider any of these factors. This knowledge eliminates the element of unfair surprise, the concern that defense counsel will waste time with a pre-sentencing filing, the possibility that defense counsel will unwittingly provide the sentencing court with a grounds for departure, and the worry of possibly undermining the adversarial process, that permeate *Burns*, thus negating its application to non-Guidelines sentences.

Here, each defendant had knowledge of the facts of his case on which the district court would rely in applying the § 3553(a) factors. The district court correctly calculated the sentencing ranges and, after considering the § 3553(a) factors, exercised its discretion to impose non-Guidelines sentences. This is not an instance when the sentencing court un-

---

Simmerer, 156 Fed. Appx. 124, 128 (11th Cir. 2005), *cert. denied* --- U.S. ---, 126 S. Ct. 1599, 164 L. Ed. 2d 321 (2006).

expectedly departed from a binding Guidelines range. Rather, the district court predictably did what any district court is empowered to do post-*Booker*. If we were to conclude that the advance notice requirement of Rule 32(h) applies to non-Guidelines sentences, we would re-elevate the Guidelines to a position it no longer enjoys.[42] Thus, we conclude that sentencing courts are not required to give pre-sentencing notice of their *sua sponte* intention to impose a non-Guidelines sentence, regardless of the pre-*Booker* pronouncements of *Burns* and Rule 32(h).

ii. *U.S.S.G. § 4A1.3*

Pursuant to U.S.S.G. § 4A1.3(a)(1), a sentencing court may impose an upward *departure* "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." In the event that the sentencing court decides to depart, it is to follow the method for calculating the extent of the departure set forth in §§ 4A1.3(a)(4)(A) and (B).

Here, the defendants argue that their sentences were unreasonable because the district court failed to comply with or consult the methodology established in § 4A1.3.[43] As each sentence was a variance and not a departure, we disagree.

We note initially that the district court's decisions to impose non-Guidelines sentences were not based exclusively on unrepresentative criminal histories. Rather, they were based on a number of § 3553(a) factors, including extensive criminal history, the need to promote respect for law, deter-

---

[42] *See Vampire Nation*, 451 F.3d at 196.

[43] On appeal, the Defendant-Appellants did not assert that their respective sentences were unreasonable in and of themselves, but instead only challenged the reasonableness of the sentences based on the district court's failure to consult and comply with § 4A1.3.

rence of future criminal conduct, and the need to protect the public. We reiterate for emphasis that § 4A1.3 applies only to *departures* – based on unrepresentative criminal history – not to *variances*. Thus, from the outset, the defendants' argument fails.

Furthermore, the defendants completely skirt our test for determining the reasonableness of a non-Guidelines sentence. We have established that a non-Guidelines sentence is unreasonable when it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.[44] Here, the defendants do not argue that the district court short-changed a particular factor, over-emphasized another, or erred in balancing multiple factors. Instead, the defendants disregard our caselaw and rely on a single, inapposite Seventh Circuit case to argue that the sentencer's failure to conduct the calculus of § 4A1.3 renders a non-Guidelines sentence *per se* unreasonable.[45]

In simplest terms, the district court in the six cases consolidated here on appeal (1) calculated the proper Guidelines ranges, (2) considered multiple § 3553(a) factors, (3) explained its reasons for imposing non-Guidelines sentences, and (4) imposed non-Guidelines sentences that we conclude are not unreasonable. We hold that the district court committed no error in calculating and imposing the defendants' sentences. Therefore, defendants' no-pre-sentencing-notice claim fails under either of the applicable standards of review.

iii. *8 U.S.C. § 1326(b)*

Finally, four of the six defendants contend that the district court inappropriately treated their prior aggravated fel-

---

[44] *Smith*, 440 F.3d at 708.

[45] *United States v. Castro-Juarez*, 425 F.3d 430 (7th Cir. 2005).

ony convictions as sentence enhancements, rather than as an element of their offenses under 8 U.S.C. § 1326(b). As this argument is foreclosed by *Almendarez-Torres v. United States*,[46] it fails.

III. *CONCLUSION*

In the post-*Booker* world of advisory Guidelines, all parties are on notice that, after considering the sentencing factors of § 3553(a), a sentencing court has the discretion to impose a non-Guidelines sentence. Stated differently, parties are conclusively presumed to have pre-sentencing knowledge of these factors. Thus, no party is unfairly prejudiced by the imposition of a non-Guidelines sentence based on a sentencing court's *sua sponte* consideration and application of § 3553(a). Accordingly, the unfair surprise and other concerns sought to be remedied by *Burns* and Rule 32(h) is no longer a legitimate concern and no longer necessitates that a sentencing court provide pre-sentencing notice of its intention to impose a non-Guidelines sentence *sua sponte*.

Based on the applicable law and our extensive review of the parties' briefs and the records of the cases consolidated in this appeal, we hold that (1) the district court was not required to provide pre-sentencing notice of its *sua sponte* intention to impose a non-Guidelines sentence; (2) the district court's failure to follow the methodology of U.S.S.G. § 4A1.3 did not constitute error; and (3) the defendants' § 1326(b) claims are non-meritorious. We therefore affirm the sentence imposed by the district court in each of these six consolidated cases.

AFFIRMED.

---

[46] 523 U.S. 224, 235, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *see United States v. Alvarado-Hernandez*, 465 F.3d 188, 190 n.2 (5th Cir. 2006).

APPENDIX B

DISTRICT COURT ORDER ON SENTENCING: PANTOJA-ARELLANO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA
v.
ANASTACIO PANTOJA-ARELLANO
NO. 1:05-CR-048-01-C

ORDER

On this date, the Court considered Defendant's Request (Pursuant to Rule 35(a)) for Correction and Reduction of Sentence Imposed in Clear Error and Defendant's Objections to the Unreasonable Upward Departure and Sentence, filed December 15, 2005. The Court further considered Defendant's Motion to Supplement Authorities, filed December 19, 2005.[1] The United States of America failed to file a response to either of Defendant's filings.

This Court sentenced Defendant on December 8, 2005. The relevant portion of the Court's stated reasons for imposing the upward variance are as follows:

> THE COURT: I will now state on the record the specific reasons for imposing the sentence I have just imposed.

---

[1] Defendant appears to have filed the supplemental authority based upon the contention that the Fifth Circuit has issued persuasive authority that might support Defendant's argument made regarding notice. However, the Court notes that the supplemental authority is a pre-*Booker* case.

As to the term of incarceration, I have made an upward variance and have imposed a term of 96 months. I believe this sentence does adequately address the sentencing objectives of punishment and deterrence, particularly in light of the defendant's criminal history.

According to my review, the defendant has had three DWI convictions, plus one additional arrest for a DWI. He has two illegal reentry convictions. He has two aiding and abetting transportation of illegal alien convictions. He has two assaults causing bodily injury to family member convictions. He has one drug offense conviction, and then there are additional convictions.

I believe that an upward variance is required in this case in order to meet the sentencing objectives as set forth in Title 18, Section 3553(a), and Title 18, Section 3661, particularly in regard to the elements of the court considering the nature and circumstances of this offense and the history and characteristics of this particular defendant. The sentence imposed, I feel, meets the sentencing objectives of reflecting the seriousness of the offense here and, also, to promote a respect for the law. Obviously this defendant has no respect for the law of this country.

Some of the sentences that he has received in prior offenses were very light sentences, in my opinion, for the offenses that he was convicted of, and, therefore, I understand why he has not had a respect for the law of this country up to this point. So what I'm doing here today is to – perhaps suggesting to the defendant that the sentence I'm imposing is an upward variance so that he will understand that the law of this nation must be respected, and he's going to have to suffer the consequences of choosing to continually illegally reenter this United States and then to commit crimes in this country.

I believe this sentence also affords adequate deterrence to the criminal conduct of this defendant. And finally,

> maybe most importantly, I believe this sentence will protect the public from further criminal activity of the defendant for at least 96 months. I consider this defendant to be a clear and present danger to the citizens of this country because primarily of his driving habits, that is, driving while under the influence of alcohol. He's putting people of this country at risk by his conduct. And, therefore, an upward variance has been imposed in this case.

(Sentencing Hr'g Dec. 8, 2005, at pp. 5-6).[2]

First, Defendant complains that no notice was given for the sentence imposed. Defendant contends that Federal Rule of Criminal Procedure 32(h) requires a sentencing court to provide notice in advance of any contemplated departure from the applicable guideline range. Defendant argues that neither he nor the government filed any prehearing submissions that raised the specter of the sentence imposed. However, the Court notes that the Plea Memorandum entered into by the Defendant, specifically paragraph 4, clearly states that the actual sentence imposed is within the Court's discretion and may be within the statutory maximum. (Plea Memorandum dated Aug. 19, 2005 at ¶ 4) (signed by Defendant and his counsel). Here, Defendant's sentence was within the statutory range. Paragraph 4 goes on to state that Defendant does not have any right to be sentenced within any particular guideline range. (*Id.*) Thus, the Plea Memorandum put Defendant on notice that this Court was free to exercise its dis-

---

[2] In the Court's Judgment, the Statement of Reasons states that "the Court sentences the defendant outside the advisory guideline range for the reasons listed in 18 USC §§ 3553(a) & 3661 and for the reasons stated in open court, which include public protection from further crimes of the defendant and to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." (J. dated Dec. 8, 2005 in Ca. No. 1:05-CR-048-01-C). Thus, the written statement of reasons not only specifically stated why the sentence was imposed but also incorporated the oral statements made in open court.

cretion and sentence him outside of the recommended guideline range but within the statutory range.

The Court also notes, as acknowledged by Defendant, that following *United States v. Booker*, 125 S. Ct. 738 (2005), district courts are allowed discretion to impose sentences outside of the guideline range. Thus, defendants are on notice that a court is no longer bound by the guidelines and may, in its discretion, impose a sentence outside of the guideline range if the circumstances so warrant. The events giving rise to this case occurred following *Booker* and Defendant accepted a plea agreement under post-*Booker* sentencing. If such discretion is to have any meaning at all, a court should be allowed during the sentencing hearing to determine that the recommended guideline range is insufficient and thus be free to sentence outside of that range. Defendant argues that the Court should have followed Guideline 4Aa.3 but recognized that said Guideline was not mandatory, while contending adherence to its calculus remains appropriate to ensure reasonable sentences. However, following *Booker*, this Court will take *Booker's* holding at its face value – advisory means exactly that, advisory and not mandatory.

Second, Defendant argues the sentence is unreasonable. Beside the fact that reasonableness is well supported by the facts stated in open court and in the statement of reasons, the Court directs the Defendant to *United States v. Saldana*, 427 F.3d 298, 312-13 (5th Cir. 2005). The *Saldana* court stated that "[a] sentencing court does not abuse its discretion in deciding to upwardly depart when its reasons for doing so (1) advance the objectives set forth in 18 U.S.C. § 3553(a)(2); (2) are authorized by 18 U.S.C. § 3553(b); and (3) are justified by the facts of the case." *Saldana*, 427 F.3d at 310. It also found that the district court's sentence was reasonable even though the sentence quadrupled the maximum sentence under the guidelines. *Id.* at 312-13 (finding that the sentence

overstated the degree of harm, did not appear to advance the goal of uniformity, and overcompensated for the number of counts – yet finding the sentence to be reasonable in light of the district court's discretion).

Third, Defendant requests a re-sentencing. Even if this Court were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the guideline range, the result would not be different. Thus, any re-sentencing would be futile in that the same sentence would result – one that the Court believes to be reasonable under the circumstances.

Therefore, Defendant's Request for Reduction of Sentence is DENIED and Defendant's Objections are OVERRULED.

SO ORDERED this 4th day of January, 2006.

/s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

APPENDIX C

DISTRICT COURT ORDER ON SENTENCING: CRUZ-MARTINEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

UNITED STATES OF AMERICA

v

ANTONIO CRUZ-MARTINEZ
NO. 6:05-CR-052-01-C

ORDER

On this date, the Court considered Defendant's Request (Pursuant to Rule 35(a)) for Correction and Reduction of Sentence Imposed in Clear Error and Defendant's Objections to the Unreasonable Upward Departure and Sentence, filed January 10, 2006. The United States of America failed to file a response.

This Court sentenced Defendant on January 6, 2006. The relevant portion of the Court's stated reasons for imposing the upward variance are as follows:

> THE COURT: I will now state on the record the specific reasons for the sentence I have just imposed.
>
> As to the term of incarceration, I have imposed a term of 60 months. This is an upward variance from the advisory guideline range. The reason I have imposed this sentence is in order to invoke a reasonable sentence pursuant to those factors as listed in Title 18, United States Code, Section 3553(a) and 3661, particularly to meet those fac-

tors addressing the nature and circumstances of this offense and the history and characteristics of the defendant, the need to promote respect for the law and to provide punishment for this offense, the need to afford adequate deterrence to further criminal conduct on the part of this defendant, and to protect the public from further crimes of the defendant.

The record shows before me that this defendant has three prior illegal reentries into this country. He's been convicted on two DWI offenses. He's been convicted of assault causing bodily injury, which assault included his wife and small children.

Backing up to one of those DWIs, on one of those occasions, he had in the vehicle with him a 7-month-old infant unrestrained in the car.

I find that Mr. Cruz is a clear and present danger to the citizens of this country. He has no respect for the law of this nation. Further convictions seemingly have not deterred him from further criminal conduct and have not deterred him from illegally reentering this country after he was deported, and, therefore, I believe the sentence of 60 months does adequately address the sentencing objectives as set forth in 3553(a) and 3661. And this sentence will run consecutive to any sentence imposed in this court in reference to any revocation proceedings.

(Sentencing Hr'g Jan. 6, 2006 in Ca. No. 6:05-CR-052-01-C).[1]

---

[1] In the Court's Judgment, the Statement of Reasons states that

the Court sentences the defendant outside the advisory guideline range for the reasons listed in 18 USC §§ 3553(a) & 3661 and for the reasons stated in open court as follows:

I will now state on the record the specific reasons for the sentence I have just imposed. As to the term of incarceration, I have imposed a

First, Defendant complains that no notice was given for the sentence imposed. Defendant contends that Federal Rule of Criminal Procedure 32(h) requires a sentencing court to provide notice in advance of any contemplated departure from the applicable Guidelines range. Defendant argues that neither he nor the government filed any pre-hearing submissions that raised the specter of the sentence imposed. However, the Court notes that the Plea Memorandum entered into by the Defendant, specifically paragraph 4, clearly states that the actual sentence to be imposed (so long as it is within the statutory maximum) is solely in the Court's discretion. (Plea Memorandum filed Oct. 14, 2005 at ¶ 4) (signed by Defendant and his counsel). Here, Defendant's sentence was within the statutory range. Paragraph 4 also states that De-

---

term of 60 months. This is an upward variance from the advisory guideline range. The reason I have imposed this sentence is in order to invoke a reasonable sentence pursuant to those factors as listed in Title 18, United States Code, Section 3553(a) and 3661, particularly to meet those factors addressing the nature and circumstances of this offense and the history and characteristics of the defendant, the need to promote respect for the law and to provide punishment for this offense, the need to afford adequate deterrence to further criminal conduct on the part of this defendant, and to protect the public from further crimes of the defendant. The record shows before me that this defendant has three prior illegal reentries into this country. He's been convicted on two DWI offenses. He's been convicted of assault causing bodily injury, which assault included his wife and small children. Backing up to one of those DWIs, on one of those occasions, he had in the vehicle with him a 7-month-old infant unrestrained in the car. I find that Mr. Cruz is a clear and present danger to the citizens of this country. He has no respect for the law of this nation. Further convictions seemingly have not deterred him from further criminal conduct and have not deterred him from illegally reentering this country after he was deported, and, therefore, I believe the sentence of 60 months does adequately address the sentencing objectives as set forth in 3553(a) and 3661.

(J. dated Jan. 6, 2006 in Ca. No. 6:05-CR-052-01-C). Thus, the written statement of reasons not only specifically stated why the sentence was imposed but also incorporated the oral statements made in open court.

fendant understands that his plea does not create a right to be sentenced within or below any particular Guidelines range. (*Id.*) Thus, the Plea Memorandum put Defendant on notice that this Court was free to exercise its discretion and sentence him outside of the recommended Guidelines range but within the statutory range.

Moreover, the Court specifically placed Defendant on notice in Defendant's plea hearing that the Sentencing Guidelines are advisory only and, if the facts so warrant, the Court could impose the statutory maximum sentence against him. Defendant acknowledged in open court that he understood this fact. The relevant portion of the hearing is as follows:

> THE COURT: Do you understand, sir, that under the statute, the maximum penalty the Court could impose is as follows:
>
> First, a term of imprisonment for a period not to exceed ten years; next, a fine not to exceed $250,000; next, an initial term of supervised release of three years, with the understanding that if there is a violation of any of the conditions of supervision, the defendant could be imprisoned and be subject to additional terms of supervised release; next, a mandatory special assessment of $100 would be imposed; and finally, the costs of incarceration and supervision would be imposed.
>
> Do you understand, sir, that's the maximum penalty that could be imposed under the statute?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you also understand, sir, this a Sentencing Guidelines case, which means I will be looking to those guidelines as a factor to consider when arriving at the sentence. But do you also understand, sir, the guidelines are advisory only. If the facts so warrant, the

Court could impose the statutory maximum sentence against you. Do you understand this?

THE DEFENDANT: Yes.

(Re-arraignment Hr'g Oct. 14, 2005 in Ca. No. 6:05-CR-052-01-C).

The Court also notes, as acknowledged by Defendant, that following *United States v. Booker*, 125 S. Ct. 738 (2005), district courts are allowed discretion to impose sentences outside of the Guidelines range. Thus, defendants are on notice that a court is no longer bound by the Guidelines and may, in its discretion, impose a sentence outside of the Guidelines range if the circumstances so warrant. The events giving rise to this case occurred following *Booker* and Defendant accepted a plea agreement under post-*Booker* sentencing. If such discretion is to have any meaning at all, a court should be allowed during the sentencing hearing to determine that the recommended Guidelines range is insufficient and thus be free to sentence outside of that range. Defendant argues that the Court should have followed Guideline 4A1.3 but recognized that said Guideline was not mandatory, while contending adherence to its calculus remains appropriate to ensure reasonable sentences.

However, following *Booker*, this Court will take *Booker's* holding at its face value – advisory means exactly that, advisory and not mandatory. As such, it is no longer clear that Federal Rule of Criminal Procedure 32(h) continues to hold the weight it did under mandatory Sentencing Guidelines. Neither party has directed the Court to Fifth Circuit precedent on the exact issue of whether Rule 32(h) notice is still required following *Booker*. In fact, Defendant has argued that the Fifth Circuit has not addressed the issue and that this Court should look to an unpublished opinion from the Tenth Circuit for direction.

This Court has found the Eighth Circuit's reasoning in *United States v. Longsoldier* to be the most logical. *See* 431 F.3d 1120, 1122 (8th Cir. Dec. 23, 2005). The Eighth Circuit expressly held in *Longsoldier* "that notice pursuant to Rule 32(h) is not required when the adjustment to the sentence is effected by a variance, rather than by a departure." The Eighth Circuit relied upon its prior holding and reasoning contained in *United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005) (distinguishing between departures and variances). The *Longsoldier* court went on to hold that "[b]ecause the district court effected only an upward variance, no Rule 32(h) notice was required." *Longsoldier*, 432 F.3d at 1122.

Defendant also recognized that this Court made a "variance" rather than a departure when imposing the sentence it imposed. (Def. Mot. at 4 (stating "this Court eloquently explained that its reasons for departing upwards – that is, for making a 'variance' – stemmed from Cruz-Martinez's criminal history. . . .").) As recognized in *Longsoldier*, there is a distinction between an upward variance and an upward departure. *See Longsoldier*, 432 F.3d at 1122 (relying upon *United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005) and *United States v. Shannon*, 414 F.3d 921, 923 (8th Cir. 2005) (holding that, post-*Booker*, the sentencing court may effect an upward variance)). The Eighth Circuit has recognized that a district court may make a "departure" under the Guidelines or may make a "variance" by relying on factors found in 18 U.S.C. § 3553(a). When making a "variance," the Eighth Circuit has expressly held that Rule 32(h) notice is not required.

More importantly, the Fifth Circuit has recognized the distinction between a Guidelines sentence and a "non-Guidelines" sentence. *See United States v. Mares*, 402 F.3d 511, 519 n.7 (5th Cir. 2005). The *Mares* court went on to define a Guidelines sentence to include "a sentence that has

been adjusted by applying a 'departure' as allowed by the Guidelines." *Id.* The Fifth Circuit court then clarified the distinction that a "non-Guidelines" sentence should be backed up by the reasons for imposing that sentence. *Id.* at 519. Thus, the "non-Guidelines" sentence (Fifth Circuit) is the same as a "variance" sentence (Eighth Circuit) – a sentence relying upon factors other than adjusted departures, specifically § 3553(a) factors. Therefore, Rule 32(h) notice was not required.

Rule 32(h) clearly applied when the Guidelines were mandatory because no departure would be expected under mandatory sentencing. However, in the event that a departure was contemplated, then notice of such a departure was required so that a defendant and the government could be on notice that a different sentence might be imposed rather than the otherwise-expected mandatory sentence. Yet, after the United States Supreme Court held the Sentencing Guidelines to be advisory, sentencing courts were no longer required to sentence at a pre-determined mandatory range. Thus, Rule 32(h)'s notice requirement is now unnecessary because any defendant being sentenced is no longer required to be sentenced at a pre-set mandatory range – a range that a defendant would have expected and relied upon. Rather, a sentencing court can now take the Sentencing Guidelines under advisement in arriving at a fair and just sentence; but it is no longer required to impose such a sentence. Therefore, the basis of Rule 32(h)'s notice requirement – that a defendant going into a sentencing knew with almost exact certainty what sentence he would receive because of the mandatory nature of the Guidelines – no longer exists. Now, a sentencing court using factors listed in § 3553(a) as the basis for the sentence is restrained by what is reasonable in its discretion and must state its reasons.

Second, Defendant argues the sentence is unreasonable based on the facts of this case.[2] In addition to the fact that reasonableness is well supported by the facts stated in open court and in the statement of reasons, the Court directs the Defendant to *United States v. Saldana*, 427 F.3d 298, 312-13 (5th Cir. 2005). The *Saldana* court stated that "[a] sentencing court does not abuse its discretion in deciding to upwardly depart when its reasons for doing so (1) advance the objectives set forth in 18 U.S.C. § 3553(a)(2); (2) are authorized by 18 U.S.C. § 3553(b); and (3) are justified by the facts of the case." *Saldana*, 427 F.3d at 310. It also found that the district court's sentence was reasonable even though the sentence quadrupled the maximum sentence under the Guidelines. *Id.* at 312-13 (finding that the sentence overstated the degree of harm, did not appear to advance the goal of uniformity, and overcompensated for the number of counts – yet finding the sentence to be reasonable in light of the district court's discretion).

Third, Defendant requests a re-sentencing. Even if this Court were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the Guidelines range, the result would not be different. Thus, any re-sentencing would be futile in that the same sentence would result – one that the Court believes to be reasonable under the circumstances. *See United States v. Miller*, 406 F.3d 323, 337 (5th Cir. 2005) ("Because *Booker* renders the guidelines advisory, if we were to remand because of an error under *Booker* the district court would have the discretion to impose the same sentence by consideration to the guidelines and the other factors enumerated in 18

---

[2] Furthermore, the Fifth Circuit has expressly held that "post-*Booker*, a sentencing judge remains entitled to find by a preponderance of the evidence all facts relevant to the determination of a Guideline sentencing range and all facts relevant to the determination of a non-Guidelines sentence." *United States v. Morales*, 2005 WL 3477829 (5th Cir. Dec. 20, 2005) (citing *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005)).

U.S.C. § 3553(a). . . . Miller can point to nothing in the record to demonstrate that, operating under an advisory sentencing scheme, the district court *would* have reached a significantly different result."). The Court also notes that Defendant requested in passing that he be re-sentenced before another sentencing judge. (Mot. at 1 ("Alternatively, Cruz-Martinez asks that this Court withdraw its sentence and allow for re-sentencing before another district court."). Nothing in Federal Rule of Criminal Procedure 35 allows for re-sentencing before another judge. Moreover, if Defendant intended the request made in passing to be a motion for recusal, a motion for recusal was not presented to the Court. Although a document may contain more than one motion, any such document must clearly identify in the title each included motion. LCrR 49.2(c). Here, the title makes no mention of recusal.

Therefore, Defendant's Request for Reduction of Sentence is DENIED and Defendant's Objections are OVERRULED.

SO ORDERED this 27th day of January, 2006.

/s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

APPENDIX D

DISTRICT COURT ORDER ON SENTENCING: DEHUMA-SUAREZ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

SAN ANGELO DIVISION

UNITED STATES OF AMERICA
v.
JOSE ANDRES DEHUMA-SUAREZ
NO. 6:05-CR-066-01-C

ORDER

On this date, the Court considered Defendant's Request 'ursuant to Rule 35(a)) for Correction and Reduction of Sen-ence Imposed in Clear Error and Defendant's Objections to ıe Unreasonable Upward Departure and Sentence, filed De-ember 30, 2005. The United States of America failed to file response.

This Court sentenced Defendant on December 30, 2005. 'he relevant portion of the Court's stated reasons for impos-ıg the upward variance are as follows:

> THE COURT: I will now state on the record the specific reasons for imposing the sentence I have just imposed.
>
> As to the term of incarceration, I have made a considerable upward variance to the statutory maximum sentence. I have made an upward variance for the following reasons:
>
> A review of this defendant's criminal history indicates that there is a violent criminal history. This defendant has been convicted of four DWIs. He has furthermore been convicted of an assault on a peace officer. He has

furthermore been charged with a sexual assault of a 14-year-old female child. This was back in 1998. That case was not prosecuted for the reason the child fled the country and went back to Mexico and was unavailable as a witness in the case.

The Court considers this defendant to be a clear and present danger to the welfare and safety of the citizens of this country for the reasons of his prior convictions. The best predictor of future behavior is to look at past behavior. The past behavior of this defendant indicates to this Court that he has no respect for the laws of this country. In addition to his violent criminal history, he has been deported twice and has then chosen to return to this country, back in 1992 and in 2004.

In order to meet the sentencing objectives of Title 18, Section 3553(a) and 3661, the Court has made this upward variance in order to reflect the seriousness of the offense in this case but, more importantly I think, to afford adequate deterrence to further criminal conduct of this defendant, based upon his prior criminal history, and to protect the public from further crimes, such as driving while intoxicated and assaulting a peace officer. Thus, by making the upward variance, the Court believes the sentencing objectives of punishment and deterrence and respect for the law are being met.

(Sentencing Hr'g Dec. 30, 2005 in Ca. No. 6:05-CR-066-01-C).[1]

---

[1] In the Court's Judgment, the Statement of Reasons states that

the Court sentences the defendant outside the advisory guideline range for the reasons listed in 18 USC §§ 3553(a) & 3661 and for the reasons stated in open court, as follows:

As to the term of incarceration, I have made a considerable upward variance to the statutory maximum sentence. I have made an upward variance for the following reasons:

First, Defendant complains that no notice was given for the sentence imposed. Defendant contends that Federal Rule of Criminal Procedure 32(h) requires a sentencing court to provide notice in advance of any contemplated departure from the applicable guideline range. Defendant argues that neither he nor the government filed any pre-hearing submissions that raised the specter of the sentence imposed. However, the Court notes that the Plea Memorandum entered into by the Defendant, specifically paragraph 4, clearly states that the actual sentence to be imposed (so long as it is within the statutory maximum) is solely in the Court's discretion. (Plea Memorandum dated Oct. 4, 2005 at ¶ 4) (signed by Defendant and his counsel). Here, Defendant's sentence was

---

> A review of this defendant's criminal history indicates that there is a violent criminal history. This defendant has been convicted of four DWIs. He has furthermore been convicted of an assault on a peace officer. He has furthermore been charged with a sexual assault of a 14-year-old female child. This was back in 1998. That case was not prosecuted for the reason the child fled the country and went back to Mexico and was unavailable as a witness in the case. The court considers this defendant to be a clear and present danger to the welfare and safety of the citizens of this country for the reasons of his prior convictions. The best predictor of future behavior is to look at past behavior. The past behavior of this defendant indicates to this court that he has no respect for the laws of this country. In addition to his violent criminal history, he has been deported twice and has then chosen to return to this country, back in 1992 and in 2004. In order to meet the sentencing objectives of Title 18, Section 3553(a) and 3661, the court has made this upward variance in order to reflect the seriousness of the offense in this case but, more importantly I think, to afford adequate deterrence to further criminal conduct of this defendant, based upon his criminal history, and to protect the public from further crimes, such as driving while intoxicated and assaulting a peace officer. Thus, by making the upward variance, the court believes the sentencing objectives of punishment and deterrence and respect for the law are being met.

(J. dated Dec. 30, 2005 in Ca. No. 6:05-CR-066-01-C). Thus, the written statement of reasons not only specifically stated why the sentence was imposed but also incorporated the oral statements made in open court.

within the statutory range. Paragraph 4 also states that Defendant understands that his plea does not create a right to be sentenced within or below any particular guideline range. (*Id.*) Thus, the Plea Memorandum put Defendant on notice that this Court was free to exercise its discretion and sentence him outside of the recommended guideline range but within the statutory range.

Moreover, the Court specifically placed Defendant on notice in Defendant's plea hearing that the sentencing guidelines are advisory only and, if the facts so warrant, the Court could impose the statutory maximum sentence against him. Defendant acknowledged in open court that he understood this fact. The relevant portion of the hearing is as follows:

> THE COURT: Do you understand, sir, that under the statute, the maximum penalty the Court could impose is as follows:
>
> First, a term of imprisonment for a period not to exceed ten years; next, a fine not to exceed $250,000; next, an initial term of supervised release of three years, with the understanding that if there is a violation of any of the conditions of supervision, the defendant could be imprisoned and be subject to additional terms of supervised release; next, a mandatory special assessment of $100 would be imposed; and finally, the costs of incarceration and supervision would be imposed.
>
> Do you understand, sir, that's the maximum penalty that could be imposed under the statute?
>
> THE DEFENDANT: Yes.
>
> THE COURT: But do you also understand, sir, this a Sentencing Guidelines case, which means I will be looking to those guidelines as a factor to consider when arriving at the sentence. But do you also understand, sir, that the guidelines are advisory only. If the facts so warrant,

the Court could impose the statutory maximum sentence against you. Do you understand this?

THE DEFENDANT: Yes.

(Re-arraignment Hr'g Oct. 6, 2005 in Ca. No. 6:05-CR-066-01-C).

The Court also notes, as acknowledged by Defendant, that following *United States v. Booker*, 125 S. Ct. 738 (2005), district courts are allowed discretion to impose sentences outside of the guideline range. Thus, defendants are on notice that a court is no longer bound by the guidelines and may, in its discretion, impose a sentence outside of the guideline range if the circumstances so warrant. The events giving rise to this case occurred following *Booker* and Defendant accepted a plea agreement under post-*Booker* sentencing. If such discretion is to have any meaning at all, a court should be allowed during the sentencing hearing to determine that the recommended guideline range is insufficient and thus be free to sentence outside of that range. Defendant argues that the Court should have followed Guideline 4A1.3 but recognized that said Guideline was not mandatory, while contending adherence to its calculus remains appropriate to ensure reasonable sentences.

However, following *Booker*, this Court will take *Booker's* holding at its face value – advisory means exactly that, advisory and not mandatory. As such, it is no longer clear that Federal Rule of Criminal Procedure 32(h) continues to hold the weight it did under mandatory sentencing guidelines. Neither party has directed the Court to Fifth Circuit precedent on the exact issue of whether Rule 32(h) notice is still required following *Booker*. In fact, Defendant has argued that the Fifth Circuit has not addressed the issue and that this Court should look to an unpublished opinion from the Tenth Circuit for direction.

This Court has found the Eighth Circuit's reasoning in *United States v. Longsoldier* to be the most logical. *See* 431 F.3d 1120, 1122 (8th Cir. Dec. 23, 2005). The Eighth Circuit expressly held in *Longsoldier* "that notice pursuant to Rule 32(h) is not required when the adjustment to the sentence is effected by a variance, rather than by a departure." The Eighth Circuit relied upon its prior holding and reasoning contained in *United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005) (distinguishing between departures and variances). The *Longsoldier* court went on to hold that "[b]ecause the district court effected only an upward variance, no Rule 32(h) notice was required." *Longsoldier*, 432 F.3d at 1122.

Defendant also recognized that this Court made a "variance" rather than a departure when imposing the sentence it imposed. (Def. Mot. at 4 (stating "this Court eloquently explained that its reasons for departing upward – that is, for making a 'variance' – stemmed from Dehuma-Suarez's criminal history. . . .")) As recognized in *Longsoldier*, there is a distinction between an upward variance and an upward departure. *See Longsoldier*, 432 F.3d at 1122 (relying upon *United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005) and *United States v. Shannon*, 414 F.3d 921, 923 (8th Cir. 2005) (holding that, post-*Booker*, the sentencing court may effect an upward variance)). The Eighth Circuit has recognized that a district court may make a "departure" under the guidelines or may make a "variance" by relying on factors found in 18 U.S.C. § 3553(a). When making a "variance," the Eighth Circuit has expressly held that Rule 32(h) notice is not required.

Rule 32(h) clearly applied when the guidelines were mandatory because no departure would be expected under mandatory sentencing. However, in the event that a departure was contemplated, then notice of such a departure was required so that a defendant and the government could be on

notice that a different sentence might be imposed rather than the otherwise-expected mandatory sentence. Yet, after the United States Supreme Court held the sentencing guidelines to be advisory, sentencing courts were no longer required to sentence at a pre-determined mandatory range. Thus, Rule 32(h)'s notice requirement is now unnecessary because any defendant being sentenced is no longer required to be sentenced at a pre-set mandatory range – a range that a defendant would have expected and relied upon. Rather, a sentencing court can now take the sentencing guidelines under advisement in arriving at a fair and just sentence; but it is no longer required to impose such a sentence. Therefore, the basis of Rule 32(h)'s notice requirement – that a defendant going into a sentencing knew with almost exact certainly what sentence he would receive because of the mandatory nature of the guidelines – no longer exists. Now a sentencing court is restrained by what is reasonable in its discretion.

Second, Defendant argues the sentence is unreasonable based on the facts of this case.[2] In addition to the fact that reasonableness is well supported by the facts stated in open

---

[2] Footnote 1 of Defendant's Motion states that "Defendant also objects to the Court's findings on the arrest for Aggravated Sexual Assault of a Child. During the hearing, the Court recited facts regarding the offense that are not listed in the Presentence Report so prior to the Court making it's [sic] findings, Counsel didn't have notice of any of the information or facts that the Court used to form its findings." (Mot. at 2 n.1.) It is unclear exactly what argument Defendant is attempting to make by such an assertion. Upon careful review, the Court finds that its reasons given in open court, as well those contained in the Statement of Reasons attached to the Judgment, are taken almost verbatim from the information contained in paragraph 32 of the Presentence Report.

Furthermore, the Fifth Circuit has expressly held that "post-*Booker*, a sentencing judge remains entitled to find by a preponderance of the evidence all facts relevant to the determination of a Guideline sentencing range and all facts relevant to the determination of a non-Guidelines sentence." *United States v. Morales*, 2005 WL 3477829 (5th Cir. Dec. 20, 2005) (citing *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005)).

court and in the statement of reasons, the Court directs the Defendant to *United States v. Saldana*, 427 F.3d 298,312-13 (5th Cir. 2005). The *Saldana* court stated that "[a] sentencing court does not abuse its discretion in deciding to upwardly depart when its reasons for doing so (1) advance the objectives set forth in 18 U.S.C. § 3553(a)(2); (2) are authorized by 18 U.S.C. § 3553(b); and (3) are justified by the facts of the case." *Saldana*, 427 F.3d at 310. It also found that the district court's sentence was reasonable even though the sentence quadrupled the maximum sentence under the guidelines. *Id.* at 312-13 (finding that the sentence overstated the degree of harm, did not appear to advance the goal of uniformity, and overcompensated for the number of counts – yet finding the sentence to be reasonable in light of the district court's discretion).

Third, Defendant requests a re-sentencing. Even if this Court were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the guideline range, the result would not be different. Thus, any re-sentencing would be futile in that the same sentence would result – one that the Court believes to be reasonable under the circumstances. *See United States v. Miller*, 406 F.3d 323, 337 (5th Cir. 2005) ("Because *Booker* renders the guidelines advisory, if we were to remand because of an error under *Booker* the district court would have the discretion to impose the same sentence by consideration to the guidelines and the other factors enumerated in 18 U.S.C. § 3553(a). . . . Miller can point to nothing in the record to demonstrate that, operating under an advisory sentencing scheme, the district court *would* have reached a significantly different result."). The Court also notes that Defendant requested in passing that he be re-sentenced before another sentencing judge. (Mot. at 1 ("Alternatively, Dehuma-Suarez asks that this Court withdraw its sentence and allow for re-sentencing before another district court."). Nothing in Federal Rule of Criminal Procedure 35 allows for re-

sentencing before another judge. Moreover, if Defendant intended the request made in passing to be a motion for recusal, a motion for recusal was not presented to the Court. Although a document may contain more than one motion, any such document must clearly identify in the title each included motion. LCrR 49.2(c). Here, the title makes no mention of recusal.

Therefore, Defendant's Request for Reduction of Sentence is DENIED and Defendant's Objections are OVERRULED.

SO ORDERED this 24th day of January, 2006.

/s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

APPENDIX E

DISTRICT COURT JUDGMENT: PANTOJA-ARELLANO

United States District Court
Northern District of Texas
Abilene Division

UNITED STATES OF AMERICA

v.

ANASTACIO PANTOJA-ARELLANO
a.k.a. Andy Pantoja, a.k.a. Armando Puentes-Herrera,
a.k.a. Pedro Garcia-Rodriguez,
Defendant.

Case Number 1:05-CR-048-01-C

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ANASTACIO PANTOJA-ARELLANO a.k.a. Andy Pantoja, a.k.a. Armando Puentes-Herrera, a.k.a. Pedro Garcia-Rodriguez, was represented by David E. Sloan.

The defendant pleaded guilty to count 1 of the indictment filed on 06/08/2005. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
8 USC § 1326 and 6 USC §§ 202(3) & (4), & 557	Illegal Re-entry After Deportation	06/06/2005	1

As pronounced on 12/08/2005, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 8th day of December, 2005.

/s/ Sam R. Cummings
DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 96 months.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released from the custody of the Bureau of Prisons, or in which the defendant makes entry into the United States, within 72 hours of release or entry.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the fist five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 USC §§ 1101 *et seq*. As a further condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of his term of supervised release, he shall also comply with the standard conditions recommended by the U.S. Sentencing Commission and shall comply with the following additional conditions:

1. The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $25.00 per month.

2. The defendant shall provide to the U.S. Probation officer any requested financial information.

3. The defendant shall not illegally re-enter the United States, if deported.

4. The defendant shall cooperate in the collection of DNA as directed by the U. S. Probation Officer, as authorized by the Justice for All Act of 2004.

APPENDIX F

DISTRICT COURT JUDGMENT: CRUZ-MARTINEZ

United States District Court
Northern District of Texas
San Angelo Division

UNITED STATES OF AMERICA

v.

ANTONIO CRUZ-MARTINEZ
Defendant.

Case Number 6:05-CR-052-01-C

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ANTONIO CRUZ-MARTINEZ, was represented by Shery Kime-Goodwin.

The defendant pleaded guilty to count 1 of the indictment filed on 07/13/2005. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
8 USC § 1326 and 6 USC §§ 202(3), (4), & 557	Illegal Reentry After Deportation	07/07/2005	1

As pronounced on 01/06/2006, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 6th day of January, 2006.

/s/ Sam R. Cummings
DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months with this term of imprisonment to run consecutive with any sentence imposed in Case No. 6:05-CR-074-C, Northern District of Texas, San Angelo Division.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released from the custody of the Bureau of Prisons, or in which the defendant makes entry into the United States, within 72 hours of release or entry.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a

duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 USC §§ 1101 *et seq.* As a further condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of his term of supervised release, he shall also comply with the standard conditions recommended by the U.S. Sentencing Commission and shall comply with the following additional conditions:

1. The defendant shall not illegally re-enter the United States, if deported.

2. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

APPENDIX G

DISTRICT COURT JUDGMENT: DEHUMA-SUAREZ

United States District Court
Northern District of Texas
San Angelo Division

UNITED STATES OF AMERICA

v.

JOSE ANDRES DEHUMA-SUAREZ
Defendant.

Case Number 6:05-CR-066-01-C

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JOSE ANDRES DEHUMA-SUAREZ, was represented by Shery Kime-Goodwin.

The defendant pleaded guilty to count 1 of the indictment filed on 11/14/2005. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
8 USC § 1326 and 6 USC §§ 202(3), (4), and 557	Illegal Reentry After Deportation	08/24/2005	1

As pronounced on 12/30/2005, the defendant is sentenced as provided in pages 1 through 4 of this Judgment.

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 30th day of December, 2005.

/s/ Sam R. Cummings
DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months.

The defendant shall remain in custody pending service of sentence.

The Court recommends that the defendant be placed at FCI Seagoville, Texas.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released from the custody of the Bureau of Prisons, or in which the defendant makes entry into the United States, within 72 hours of release or entry.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer

any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the

Immigration and Naturalization Act, 8 USC §§ 1101 *et seq.* As a further condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of his term of supervised release, he shall also comply with the standard conditions recommended by the U.S. Sentencing Commission and shall comply with the following additional conditions:

1. The defendant shall not illegally re-enter the United States, if deported.

2. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

APPENDIX H
DISTRICT COURT JUDGMENT: ESTRADA

United States District Court
Northern District of Texas
Abilene Division

UNITED STATES OF AMERICA

v.

LUIS ESTRADA
Defendant.

Case Number 1:04-CR-0018-01-C

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, LUIS ESTRADA, was represented by David E. Sloan.

The defendant pleaded guilty to count 1 of the indictment filed on 03/23/2004. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
8 USC § 1324(a)(1)(A)(ii) and 18 USC § 2	Transportation of Illegal Aliens and Aiding and Abetting	03/09/2004	1

As pronounced on 01/06/2005, the defendant is **resentenced as provided in pages 1 through 4 of this Judg-**

ment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The sentence imposed on October 8, 2004, having been remanded by the Fifth Circuit, the defendant is re-sentenced.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 6th day of January, 2006.

/s/ Sam R. Cummings
DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 41 months.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic or drug or alcohol dependency which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. It is ordered that the de-

fendant contribute to the costs of services rendered (co-payment) at a rate of at least $10.00 per month.

2. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

APPENDIX I

DISTRICT COURT JUDGMENT: MEJIA-HUERTA

United States District Court
Northern District of Texas
Lubbock Division

UNITED STATES OF AMERICA

v.

OMAR MEJIA-HUERTA
a.k.a. "Omar Huerta-Mejia," a.k.a. "Omar Mejia,"
a.k.a. "Ivan Mexia-Huerta," a.k.a. "Omar Mexia,"
Defendant.

Case Number 5:05-CR-050-01-C

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, OMAR MEJIA-HUERTA a.k.a. "Omar Huerta-Mejia," a.k.a. "Omar Mejia," a.k.a. "Ivan Mexia-Huerta," a.k.a. "Omar Mexia," was represented by Enrique Martinez.

The defendant pleaded guilty to count 1 of the indictment filed on 05/11/2005. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
8 USC § 1326 and	Illegal Reentry After Deportation	05/11/2005	1

6 USC §§
202(3) & (4)
& 557

As pronounced on 12/02/2005, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 2nd day of December, 2005.

/s/ Sam R. Cummings
DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months.

The defendant shall remain in custody pending service of sentence.

The Court recommends that the defendant be placed at FCI Big Spring, Texas.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on ____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal
By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released from the custody of the Bureau of Prisons, or in which the defendant makes entry into the United States, within 72 hours of release or entry.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a

duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 USC §§ 1101 *et seq.* As a further condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of his term of supervised release, he shall also comply with the standard conditions recommended by the U.S. Sentencing Commission and shall comply with the following additional conditions:

1. The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of a least $10.00 per month.

2. The defendant shall not illegally re-enter the United States, if deported.

3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

APPENDIX J

DISTRICT COURT JUDGMENT: CRADDOCK

United States District Court
Northern District of Texas
Lubbock Division

UNITED STATES OF AMERICA

v.

TABRODRICK DESHAUN CRADDOCK
Defendant.

Case Number 5:05-CR-068-01-C

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, TABRODRICK DESHAUN CRADDOCK, was represented by Shery Kime-Goodwin.

The defendant pleaded guilty to count 1 of the indictment filed on 07/13/2005. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
8 USC § 922(g)(1)	Felon in Possession of a Firearm	06/20/2005	1

As pronounced on 02/03/2006, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 3rd day of February, 2006.

/s/ Sam R. Cummings
DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months.

The defendant shall remain in custody pending service of sentence.

The Court recommends that the defendant be placed at FCI Big Spring, Texas.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to

_____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in ac-

cordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any

person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic, drug or alcohol dependency which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $25.00 per month.

2. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

APPENDIX K

DEPARTMENT OF JUSTICE LETTER

U.S. Department of Justice
Criminal Division
Washington, D.C. 20530
March 28, 2006

Hon. Richard Cushing Donovan, Clerk
United States Court of Appeals for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston, Massachusetts 02210

Re: *U.S. v. Mateo*, No. 05-1805, and *U.S. v. Jones*, No. 05-1541

Dear Mr. Donovan:

On March 23, 2006, this Court entered an order noting that the government had taken inconsistent positions in these appeals on the question whether, following *United States* v. *Booker*, 543 U.S. 220 (2005), the district court is required to provide notice before it sentences a defendant outside the advisory Guidelines range. The Court invited the government to file a supplemental brief if it wished to modify its position in either case. As explained below, the sentencing court does have an obligation to provide prior notice before deviating from the Guidelines range on a ground that was not identified in the presentence report or by the parties. In both of these cases, the district court erred in failing to notify the parties that it was considering an upward deviation. We continue to believe, as set forth in the briefs previously filed, that Mateo's sentence should be affirmed, but that Jones's sentence should be vacated and remanded for resentencing.

In *Burns* v. *United States*, 501 U.S. 129 (1991), the Supreme Court construed a prior version of Federal Rule of Criminal Procedure 32 to require a sentencing court to give notice to the parties before departing sua sponte from the Guidelines range. 501 U.S. at 135-139; see *id.* at 135 n.4 (notice requirement applies to both upward and downward departures). The Court acknowledged that the rule contained no "express language" requiring prior notice of sua sponte departures, *id.* at 132, 136, but concluded that reading Rule 32 to dispense with notice would be inconsistent with the rule's "purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." *Id.* at 137.

After *Burns*, Rule 32 was amended to provide that the district court, before it "depart[s] from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, * * * must give the parties reasonable notice" of "any ground on which the court is contemplating a departure." Fed. R. Crim. P. 32(h). Although Rule 32(h) by its terms applies only to "departures" from the Guidelines range, the need for "full adversary testing of the issues relevant" to sentencing, 501 U.S. at 135, continues to apply in the advisory Guidelines system. This Court has made clear that "the guidelines continue * * * to be an important consideration in sentencing," *United States* v. *Jimenez-Beltre*, 2006 WL 262154, at *2 (1st Cir. Mar. 9, 2006) (en banc), and that a district court should first calculate the Guidelines range, "including any proposed departures," before making the "further determination whether other factors identified by either side warrant an ultimate sentence above or below the guideline range." *Id.* at *3. It would make little sense to require notice of potential departure grounds, while forcing the government and the defendant to "guess when or on what grounds" a district court might deviate from the Guidelines. *Burns*, 501 U.S. at 137. Accordingly, a district court should

provide notice to the parties when it is contemplating a sua sponte deviation (whether upward or downward) from the advisory Guidelines range.

United States v. Antonio Mateo (No. 05-1805). The district court deviated sua sponte from the Guidelines range of 30-37 months, sentencing Mateo to 48 months of imprisonment based on his status as a "fourth-time offender" and his "continuous pattern of criminal behavior." Although the court erred in failing to provide the parties with notice that it was considering a deviation on this ground, the error does not require a remand for resentencing. As explained in the government's principal brief (at 13-14), because Mateo did not object to the absence of notice at sentencing, his claim is reviewed under the plain error standard. Neither the Supreme Court nor this Court has previously considered whether notice of sua sponte deviations is required, and the error therefore is not "plain" or "obvious." See Gov't Br. 16-17. In addition, Mateo does not challenge the facts on which the court relied or suggest any additional evidence he could have offered at sentencing if he had received notice of the court's contemplated departure. See Gov't Br. 21. Thus, he cannot show that the error affected his substantial rights. Accordingly, Mateo's sentence should be affirmed.

United States v. Matthew Jones (No. 05-1541). The district court sentenced Jones to 180 months of imprisonment, explaining that it was deviating from the Guidelines range of 100-125 months on several grounds, including Jones's having absconded to Alabama after state charges were filed against him, and the resulting disruption and expense of capturing him. Neither the PSR nor the government had recommended an upward deviation. At the sentencing hearing, Jones's counsel twice objected to the court's failure to provide prior notice that it was considering deviating on these grounds and requested an opportunity to brief the issues. It was evident that counsel was not entirely prepared to address

the newly identified bases for an upward deviation. See Gov't Br. 4-5, 13-14. In these circumstances, the government does not contend that the error was harmless, and agrees that a remand for resentencing is required.

Very truly yours,

/s/ Patty Merkamp Stemler (by D.C.L.)
PATTY MERKAMP STEMLER
Chief, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 1264
Washington, D.C. 20530
(202) 514-2611

/s/ Nelson Perez-Sosa (by D.C.L.)
NELSON PÉREZ-SOSA
Assistant U.S. Attorney
Senior Appellate Attorney
United States Attorney's Office
District of Puerto Rico
Torre Chardón, Room 1201
350 Carlos Chardón Street
San Juan, Puerto Rico 00918
(787) 766-5656

/s/ Donald C. Lockhart
DONALD C. LOCKHART
Bar No. 62470
Assistant U.S. Attorney
District of Rhode Island
Fleet Center
50 Kennedy Plaza, 8th Floor
Providence, RI 02903
(401) 709-5000

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2006, I served two copies of the foregoing letter brief of the United States, by fax and by first class mail, postage prepaid, on:

Laura Maldonado-Rodriguez, Esq.
P.O. Box 11533
San Juan, Puerto Rico 00922-1533
Counsel for Appellant Antonio Mateo (No. 05-1805)

James R. Knudsen, Esq.
Whittenberg & Associates
200 Broadway - Suite 306
Lynnfield, Massachusetts 01940
Counsel for Appellant Matthew Jones (No. 05-1541)

/s/ Donald C. Lockhart

Supreme Court, U.S.
FILED
JUL 17 2007
OFFICE OF THE CLERK

No. 06-1381

In the Supreme Court of the United States

OMAR MEJIA-HUERTA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

STEPHAN E. OESTREICHER, JR.
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 32 requires a district court to give the parties advance notice before imposing a sentence outside the applicable advisory Sentencing Guidelines range based on the criteria set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004), when the grounds for the non-Guidelines sentence are not identified in the presentence report or the parties' prehearing submissions.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Burns v. *United States*, 501 U.S. 129 (1991) 5, 8, 9, 11
Gall v. *United States*, cert. granted, No. 06-7949 (June 11, 2007) 8, 15
Rita v. *United States*, No. 06-5754, 2007 WL 1772146 (June 21, 2007) 12
United States v. *Anati*, 457 F.3d 233 (2d Cir. 2006) 11, 12, 13
United States v. *Atencio*, 476 F.3d 1099 (10th Cir. 2007) 13
United States v. *Booker*, 543 U.S. 220 (2005) 7, 10
United States v. *Cantrell*, 433 F.3d 1269 (9th Cir. 2006) 11
United States v. *Cousins*, 469 F.3d 572 (6th Cir. 2006) .. 13
United States v. *Davenport*, 445 F.3d 366 (4th Cir. 2006) 13
United States v. *Dean*, 202 Fed. Appx. 775 (5th Cir. 2006) 14
United States v. *Dixon*, 449 F.3d 194 (1st Cir. 2006) 11
United States v. *Evans-Martinez*, 448 F.3d 1163 (9th Cir. 2006) 12, 13

Cases—Continued Page

United States v. *Gentry*, 214 Fed. Appx. 403 (5th Cir. 2007) 14

United States v. *Irizarry*, 458 F.3d 1208 (11th Cir. 2006), petition for cert. pending, No. 06-7517 (filed Oct. 26, 2006) 13

United States v. *Johnston*, 268 U.S. 220 (1925) 13

United States v. *Jointer*, 457 F.3d 682 (7th Cir. 2006), petition for cert. pending, No. 06-7600 (filed Oct. 27, 2006) 11

United States v. *Long Soldier*, 431 F.3d 1120 (8th Cir. 2005) 13

United States v. *Mateo*, 179 Fed. Appx. 64 (1st Cir. 2007) 14

United States v. *Olano*, 507 U.S. 725 (1993) 14

United States v. *Teague*, 443 F.3d 1310 (10th Cir.), cert. denied, 127 S. Ct. 247 (2006) 14

United States v. *Terrell*, 445 F.3d 1261 (10th Cir. 2006) 11

United States v. *Vampire Nation*, 451 F.3d 189 (3d Cir.), cert. denied, 127 S. Ct. 424 (2006) 13

United States v. *Walker*, 447 F.3d 999 (7th Cir.), cert. denied, 127 S. Ct. 314 (2006) 13

United States v. *Williams*, 469 F.3d 963 (11th Cir. 2006) 14

Statutes, guideline and rule:

8 U.S.C. 1324(a)(1)(A)(ii) 2

8 U.S.C. 1326 2

18 U.S.C. 922(g)(1) 2

Statutes, guideline and rule—Continued Page

18 U.S.C. 3552(a) 12
18 U.S.C. 3553(a) (2000 & Supp. IV 2004) ..... *passim*
United States Sentencing Guidelines Ch. 5, Pt. K 7
Fed. R. Crim. P.:
Rule 32 ..... *passim*
Rule 32(a)(1) (1990) 9
Rule 32(h) 5, 6, 8, 10, 12, 15
Rule 32(i)(1)(C) 10, 12

Miscellaneous:

Committee on Rules of Practice & Procedure, Judicial Conference, *Report of the Judicial Conference* (Sept. 2006) 15

In the Supreme Court of the United States

No. 06-1381

OMAR MEJIA-HUERTA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 480 F.3d 713.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2007. The petition for a writ of certiorari was filed on April 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in separate proceedings before the same district judge in the United States District Court for the Northern District of Texas, petitioners were convicted of various immigration and firearms offenses and were sentenced to terms of imprisonment ranging from 36 to 120 months. In a consolidated ap-

peal, the court of appeals affirmed the sentences imposed by the district court. Pet. App. 1a-18a.

1. Petitioners Mejia-Huerta, Pantoja-Arellano, Dehuma-Suarez, and Cruz-Martinez were each convicted of illegally reentering the United States after being deported, in violation of 8 U.S.C. 1326. Pet. App. 4a-7a. Petitioner Estrada was convicted of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(1)(A)(ii). Pet. App. 8a. Petitioner Craddock was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 9a.

2. Between December 2005 and February 2006, petitioners were sentenced by the same district judge in the United States District Court for the Northern District of Texas. Pet. App. 48a-76a. In each instance, the court imposed a prison term exceeding the applicable advisory Sentencing Guidelines range based on the criteria set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). Pet. App. 4a-9a. In addition, in each instance, the grounds for the non-Guidelines sentence were not identified in the presentence report or the parties' prehearing submissions. *Ibid.*

a. Petitioner Mejia-Huerta was sentenced in December 2005. Pet. App. 67a. Although his advisory Guidelines range was 9 to 15 months of imprisonment, the district court—without notice to the parties—sentenced him to 36 months of imprisonment, to be followed by three years of supervised release. *Id.* at 4a. The court stated that the variance from the Guidelines sentence was based on Mejia-Huerta's disrespect for the laws of the United States, his long criminal history, and the danger he poses to United States citizens. *Ibid.*; Mejia-Huerta Sent. Tr. 5-6. Mejia-Huerta did not object to the

lack of notice or to the sentence, *id.* at 6-7, but he timely filed a notice of appeal. Pet. App. 4a.

b. Petitioner Pantoja-Arellano was sentenced in December 2005. Pet. App. 43a. Although his advisory Guidelines range was 33 to 41 months of imprisonment, the district court—without notice to the parties—sentenced him to 96 months of imprisonment, to be followed by three years of supervised release. *Id.* at 5a. The court stated that the variance was based on Pantoja-Arellano's disrespect for the laws of the United States, his long criminal history, and the danger he poses to United States citizens. *Ibid.*; Pantoja-Arellano Sent. Tr. 5-6. Pantoja-Arellano objected orally to the sentence, *id.* at 7, and he later filed a written objection in which he argued that the court had erred in failing to give him notice under Federal Rule of Criminal Procedure 32(h) of its intent to vary from the advisory range. Pet. App. 5a, 21a. In overruling that objection, the court noted that it would impose the "same sentence" even if it "were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the guideline range." *Id.* at 23a. Pantoja-Arellano timely filed a notice of appeal. *Id.* at 5a.

c. Petitioner Dehuma-Suarez was sentenced in December 2005. Pet. App. 54a. Although his advisory Guidelines range was 21 to 27 months of imprisonment, the district court—without notice to the parties—sentenced him to 120 months of imprisonment, to be followed by three years of supervised release. *Id.* at 6a. The court stated that the variance was based on Dehuma-Suarez's disrespect for the laws of the United States, his long and violent criminal history, and the danger he poses to United States citizens. *Ibid.*; Dehuma-Suarez Sent. Tr. 4-5. Dehuma-Suarez did not

object during the sentencing hearing, *id.* at 5-6, but he later filed a written objection in which he argued that the court had erred in failing to give him notice under Rule 32(h) of its intent to vary from the advisory range. Pet. App. 6a, 35a. In overruling that objection, the court noted that it would impose the "same sentence" even if it "were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the guideline range." *Id.* at 40a. Dehuma-Suarez timely filed a notice of appeal. *Id.* at 6a.

d. Petitioner Cruz-Martinez was sentenced in January 2006. Pet. App. 49a. Although his advisory Guidelines range was 21 to 27 months of imprisonment, the district court—without notice to the parties—sentenced him to 60 months of imprisonment, to be followed by three years of supervised release. *Id.* at 7a. The court stated that the variance was based on Cruz-Martinez's disrespect for the laws of the United States, his long and violent criminal history, and the danger he poses to United States citizens. *Ibid.*; Cruz-Martinez Sent. Tr. 4-6. Cruz-Martinez objected orally to the sentence, *id.* at 6-7, and he later filed a written objection in which he argued that the court had erred in failing to give him notice under Rule 32(h) of its intent to vary from the advisory range. Pet. App. 7a, 26a. In overruling that objection, the court noted that it would impose the "same sentence" even if it "were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the Guidelines range." *Id.* at 31a. Cruz-Martinez timely filed a notice of appeal. *Id.* at 8a.

e. Petitioner Estrada was sentenced in January 2006. Pet. App. 60a. Although his advisory Guidelines range was 27 to 33 months of imprisonment, the district

court—without notice to the parties—sentenced him to 41 months of imprisonment, to be followed by three years of supervised release. *Id.* at 8a. The court stated that the variance was based on Estrada's disrespect for the laws of the United States, the danger he poses to the public, and the fact that he was involved in the transportation of 27 illegal aliens. Estrada Sent. Tr. 7-8. At the conclusion of the sentencing hearing, Estrada stated that he would "file a written objection on the notice requirement," *id.* at 9, but he did not elaborate any further, and he did not ever file any written objection. He did, however, timely file a notice of appeal. Pet. App. 8a.

f. Petitioner Craddock was sentenced in February 2006. Pet. App. 72a. Although his advisory Guidelines range was 21 to 27 months of imprisonment, the district court—without notice to the parties—sentenced him to 60 months of imprisonment, to be followed by three years of supervised release. *Id.* at 9a. The court stated that the variance was based on Craddock's especially "violent and assaultive background" and the danger he poses to the public. Craddock Sent. Tr. 5-7. Craddock did not object to the lack of notice or to the sentence, *id.* at 8, but he timely filed a notice of appeal. Pet. App. 9a.

3. In a consolidated appeal, petitioners argued that, under Rule 32(h) and *Burns* v. *United States*, 501 U.S. 129 (1991), they were entitled to reasonable notice that the district court was contemplating a sentence above the applicable advisory Guidelines range. Pet. C.A. Br. 8-16. The government agreed that the district court had "erred in not giving [petitioners] advance notice of its intention to impose a sentence above the advisory guideline range" in each instance, Gov't C.A. Br. 13; *id.* at 16-18, but the government argued that, under the harmless-error and plain-error doctrines, the court's

failure to provide notice did not warrant reversal of any of petitioners' sentence. *Id.* at 13-14, 18-21.

The court of appeals affirmed all of the sentences. Pet. App. 1a-18a. At the outset, the court noted that petitioners Pantoja-Arellano and Cruz-Martinez had made timely objections to the lack of notice, *id.* at 10a; assumed for the sake of argument that petitioner Dehuma-Suarez's post-sentencing pleading sufficed as a contemporaneous objection, *id.* at 10a-11a & n.17; observed that petitioners Mejia-Huerta and Craddock had not objected, *id.* at 4a, 9a, 11a; and concluded that petitioner Estrada's statement that he would "file a written objection on the notice requirement" did not suffice to preserve the issue, because he failed to file such a pleading. *Id.* at 11a & n.22. Accordingly, the court determined that Pantoja-Arellano's, Dehuma-Suarez's, and Cruz-Martinez's lack-of-notice claims should be reviewed for harmless error, whereas Mejia-Huerta's, Estrada's, and Craddock's lack-of-notice claims should be reviewed for plain error. *Id.* at 10a-11a.

The court of appeals then concluded that the district court had not committed error of any kind in failing to give the parties notice of its intention to vary *sua sponte* from the advisory Guidelines ranges. Pet. App. 12a-16a. The court of appeals first noted that Federal Rule of Criminal Procedure 32(h) states that, before a sentencing court "may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure." Pet. App. 3a n.3 (quoting the rule); see *id.* at 12a, 15a. The court further observed that Rule 32(h) is a codification of this Court's decision in *Burns*, which had likewise

required advance notice of *sua sponte* Guidelines departures in order to ensure focused adversarial testing of sentencing issues. *Id.* at 12a. The court of appeals emphasized, however, that the "non-Guidelines" sentence imposed on each of the petitioners was a "variance" based on the district court's consideration of the sentencing criteria set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004), not a "departure" pursuant to Chapter 5 of Part K of the Guidelines. Pet. App. 15a-16a.

The court of appeals noted that other circuits have disagreed on whether Rule 32's notice requirement applies to Section 3553(a) variances. Pet. App. 14a-15a. The court aligned itself with those courts of appeals that have held that the notice requirement applies only to departures and does not apply to variances:

> [T]he plain language of Rule 32(h) limits its application to *departures*. It contains no language even hinting that it might apply elsewhere. * * * In addition, as [*United States* v.] *Booker*[, 543 U.S. 220 (2005),] has rendered the Guidelines purely advisory, the concerns that precipitated [the notice requirement] are no longer viable. Sentencing post-*Booker* is a heavily discretionary exercise. Sentencing courts need only consider the Guidelines as informative and must consult the full host of factors set forth in § 3553(a) before rendering a reasonable non-Guidelines sentence. These factors are known (or knowable) by the parties prior to sentencing, thus putting the litigants on notice that a sentencing court has discretion to consider any of these factors. This knowledge eliminates the element of unfair surprise, the concern that defense counsel will waste time with a pre-sentencing filing, the possibility that defense counsel will unwittingly provide the sentencing court

> with a grounds for departure, and the worry of possibly undermining the adversarial process[.]

Id. at 15a. Accordingly, the court of appeals affirmed petitioners' sentences.[1]

ARGUMENT

Petitioners (Pet. 14-30) seek review of whether Rule 32(h) requires a district court to provide notice of its intent to impose a sentence outside the applicable advisory Sentencing Guidelines range based on the criteria set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004) when the grounds for the non-Guidelines sentence are not identified in the presentence report or the parties' prehearing submissions. Although there is a conflict among the courts of appeals on that question, this Court's review is not warranted at this time, for three reasons. First, the Court's resolution of the issue would not affect the outcome in this case. Second, the Judicial Conference is studying the possibility of amending Rule 32 to provide clarification on the notice issue. Third, the Court should not address the notice issue until after its decision in *Gall* v. *United States*, cert. granted, No. 06-7949 (June 11, 2007), because the decision in that case may shed light on the correct resolution of the issue and may thus lead the courts of appeals to alter or to refine their conclusions about the scope of Rule 32.

1. a. In *Burns* v. *United States*, 501 U.S. 129 (1991), this Court construed a prior version of Rule 32 to require a sentencing court to give notice to the parties before departing *sua sponte* from the applicable Guidelines range. 501 U.S. at 135-139; see *id.* at 135 n.4 (stat-

---

[1] The court of appeals also rejected other contentions that petitioners have not renewed in this Court. Pet. App. 16a-18a.

ing that the notice requirement applies to both upward and downward departures). The Court acknowledged that the rule contained no "express language" requiring advance notice of *sua sponte* departures. *Id.* at 132; see *id.* at 136. The Court concluded, however, that notice was implicitly required by the rule's mandate that the parties have "an opportunity to comment upon the probation officer's determination [in the presentence report] and on other matters relating to the appropriate sentence." *Id.* at 135 (quoting Fed. R. Crim. P. 32(a)(1) (1990)). The Court reasoned that whether a *sua sponte* departure from the Guidelines is warranted is "[o]bviously * * * a 'matte[r] relating to the appropriate sentence,'" and "it makes no sense to impute to Congress an intent that a defendant have the right *to comment* on the appropriateness of a *sua sponte* departure but not the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135-136 (quoting Fed. R. Crim. P. 32(a)(1) (1990)).

The Court also reasoned that reading Rule 32 to dispense with notice would be inconsistent with the rule's "purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." *Burns*, 501 U.S. at 137. Finally, the Court relied on the doctrine of constitutional avoidance, noting that, if Rule 32 were "read * * * to dispense with notice, [the Court] would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138.

In 2002, Rule 32 was amended by the addition of a new subsection that expressly codified the Court's holding in *Burns*. That subsection provides that the district court, before it "depart[s] from the applicable sentencing range on a ground not identified for departure either

in the presentence report or in a party's prehearing submission, * * * must give the parties reasonable notice" of "any ground on which the court is contemplating a departure." Fed. R. Crim. P. 32(h). At the same time, the language on which the Court relied in *Burns* was retained and designated as Rule 32(i)(1)(C). See Fed. R. Crim. P. 32(i)(1)(C) (stating that the sentencing court "must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence").

b. This Court subsequently decided *United States* v. *Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory rather than mandatory. Since *Booker*, courts have considered whether Rule 32's notice requirement applies not only to a departure under the Guidelines but also to a decision by a sentencing court to exercise its post-*Booker* discretion to impose a non-Guidelines sentence based on the criteria in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). In the government's view, Rule 32's notice requirement applies to such a decision.

Although Rule 32(h) refers only to "departures," Fed. R. Crim. P. 32(h), Rule 32 elsewhere continues to mandate that the district court allow the parties "to comment on * * * matters relating to an appropriate sentence," Fed. R. Crim. P. 32(i)(1)(C). As described above, this Court concluded in *Burns* that the mandate that the parties be allowed to comment on sentencing matters requires that they receive notice of *sua sponte* departures. The same reasoning that led this Court to that conclusion also indicates that notice is required before a sentencing court may impose a non-Guidelines sentence based on the criteria in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). Just like a departure, a decision to

impose a non-Guidelines sentence under Section 3553(a) is "[o]bviously" a "matte[r] relating to the appropriate sentence," and "it makes no sense to impute to Congress an intent that a defendant have the right *to comment* on the appropriateness of [that decision] but not the right *to be notified* that the court is contemplating such a ruling." *Burns*, 501 U.S. at 135-136.

The other reasons for the notice requirement recognized in *Burns* also support the conclusion that the requirement extends to notice that the sentencing court is contemplating a non-Guidelines sentence under Section 3553(a). By construing Rule 32 to require notice before imposition of non-Guidelines sentences under Section 3553(a), courts avoid the constitutional issue of whether notice is required by due process. See *Burns*, 501 U.S. at 138. In addition, notice promotes Rule 32's goal of "full adversary testing of the issues relevant" to sentencing. *Id.* at 135. Even under the post-*Booker* advisory Guidelines system, determination of the Guidelines range remains the "starting point for constructing a defendant's sentence." *United States* v. *Dixon*, 449 F.3d 194, 204 (1st Cir. 2006).[2] Although the parties know that the sentencing court will consider the Section 3553(a) factors and may impose a sentence outside the Guidelines range based on those factors, "application of those factors turns on relevant facts, some of which might be in the [c]ourt's mind but not previously disclosed." *United States* v. *Anati*, 457 F.3d 233, 237 (2d Cir. 2006). If the presentence report and the parties' submissions

---

[2] See *United States* v. *Anati*, 457 F.3d 233, 236-237 (2d Cir. 2006); *United States* v. *Jointer*, 457 F.3d 682, 686 (7th Cir. 2006), petition for cert. pending, No. 06-7600 (filed Oct. 27, 2006); *United States* v. *Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006); *United States* v. *Terrell*, 445 F.3d 1261, 1264 (10th Cir. 2006).

have not discussed the matter, the parties need notice of the grounds on which the court is considering imposing a non-Guidelines sentence in order to ensure the full airing of the issues that will determine the sentence. *Ibid.*; *United States* v. *Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006).

This Court's recent decision in *Rita* v. *United States*, No. 06-5754, 2007 WL 1772146 (June 21, 2007), also suggests that a district court must give the parties notice that it is contemplating a non-Guidelines sentence. The Court in *Rita* noted that the Guidelines still generally provide the framework for the sentencing process. The Court explained that the district court will normally begin the process "by considering the presentence report and its interpretation of the Guidelines." *Id.* at *9 (citing 18 U.S.C. 3552(a) and Rule 32). The sentencing court will then consider arguments for a departure (where the case "falls outside the 'heartland' to which the Commission intends individual Guidelines to apply") or for a variance "because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless." *Ibid.* The Court emphasized that, regardless of the ultimate sentence imposed, the sentencing court must conduct "the thorough adversarial testing contemplated by federal sentencing procedure." *Ibid.* In making that point, the Court cited Rule 32(h) and (i)(1)(C), as well as *Burns*, for the "importance of notice and meaningful opportunity to be heard at sentencing." *Ibid.*

2. As petitioners observe (Pet. 16-26), the courts of appeals have reached differing conclusions on whether notice is required before a court may impose a non-Guidelines sentence based on the criteria in Section

3553(a). The Second, Fourth, Sixth, Ninth, and Tenth Circuits have held that notice is required. See *Anati*, 457 F.3d at 235-237; *United States* v. *Davenport*, 445 F.3d 366, 371 (4th Cir. 2006); *United States* v. *Cousins*, 469 F.3d 572, 579-580 (6th Cir. 2006); *Evans-Martinez*, 448 F.3d at 1166-1167; *United States* v. *Atencio*, 476 F.3d 1099, 1103-1105 (10th Cir. 2007). The Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held to the contrary. See *United States* v. *Vampire Nation*, 451 F.3d 189, 195-196 (3d Cir.), cert. denied, 127 S. Ct. 424 (2006); Pet. App. 14a-16a; *United States* v. *Walker*, 447 F.3d 999, 1006 (7th Cir.), cert. denied, 127 S. Ct. 314 (2006); *United States* v. *Long Soldier*, 431 F.3d 1120, 1122 (8th Cir. 2005); *United States* v. *Irizarry*, 458 F.3d 1208, 1211-1212 (11th Cir. 2006), petition for cert. pending, No. 06-7517 (filed Oct. 26, 2006).

Despite the conflict among the courts of appeals, this Court's review is not warranted in this case. As the court of appeals noted, petitioners Mejia-Huerta, Estrada, and Craddock failed to preserve their notice claims in the district court. Pet. App. 11a.[3] Accordingly, they would be entitled to relief only if they could show plain error that affected their substantial rights, and

---

[3] Petitioner Estrada suggests (Pet. 11 & n.4) that he preserved his notice claim by lodging a "verbal pro forma objection" at his sentencing hearing. The court of appeals concluded otherwise (Pet. App. 11a & n.22), and that fact-bound conclusion does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). In any event, as the court of appeals correctly observed (Pet. App. 11a n.22), Estrada's statement that he would "file a written objection on the notice requirement" provided neither sufficient detail on the substance of the objection nor an opportunity for the district court to cure the alleged error or to make clear that any error had not affected Estrada's sentence.

only if the error seriously affected the fairness, integrity or public reputation of the sentencing proceedings. *United States* v. *Olano*, 507 U.S. 725, 732 (1993). They cannot make that showing, because a sentencing court's failure to provide notice that it is contemplating a Section 3553(a) variance is not a plain or obvious error. See, *e.g.*, *United States* v. *Gentry*, 214 Fed. Appx. 403, 405 (5th Cir. 2007); *United States* v. *Dean*, 202 Fed. Appx. 775, 777 (5th Cir. 2006); *United States* v. *Mateo*, 179 Fed. Appx. 64, 65 (1st Cir. 2007); see generally, *e.g.*, *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error where there is no controlling case law and the circuits are divided); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 127 S. Ct. 247 (2006). Similarly, there can be no doubt that a favorable ruling from this Court on the notice issue would have no effect on the sentences of petitioners Pantoja-Arellano, Dehuma-Suarez, and Cruz-Martinez. The district court explicitly stated that it would impose the "same sentence" on each of those petitioners even if it "were to vacate its prior sentence and formally notify the parties in writing that the sentence imposed may be outside of the guideline range." Pet. App. 23a, 40a; see *id.* at 31a. Although petitioners make a conclusory assertion that, with sufficient notice, they "could have introduced evidence to rebut the district court's assertions that all of [petitioners] were dangerous and lacked respect for the laws of the United States and could have addressed whether the criminal history scores from the Guidelines were non-representative" (Pet. 27), petitioners have made no proffer of any evidence that counsel would have provided. Because the outcome of this case would have been the same under any view of Rule 32, further review is unwarranted.

Further review would also be inappropriate because the Judicial Conference is studying the possibility of amending Rule 32 to provide clarification on the notice issue. The Conference's Committee on Rules of Practice and Procedure recently circulated for public comment a proposal to amend Rule 32(h) to require a sentencing court to provide notice to the parties of any ground for imposing a non-Guidelines sentence not previously identified in the presentence report or by the parties themselves. "After discussion at the Standing Committee of recent decisions taking various approaches to the question whether notice must be given, the proposed amendment to subdivision (h) was withdrawn to permit further study." See Committee on Rules of Practice & Procedure, Judicial Conference, *Report of the Judicial Conference* Rules App. at H-3 (Sept. 2006). If, after that further study, the Conference decides to clarify the rule, this Court's intervention would be unnecessary. Petitioners suggest (Pet. 29-30 & n.8) that review is warranted now because any amendment to the rule would not go into effect until at least 2010. But, even assuming petitioners' calculations are correct, the fundamental point remains the same. Any decision by this Court on the scope of Rule 32 would have limited long-term effect in the event of a rule change.

Finally, review would be premature at this juncture because a case currently pending before the Court may shed light on the proper resolution of the notice issue and may thus lead the courts of appeals to alter or to refine their conclusions about the scope of Rule 32. The Court has granted a writ of certiorari in *Gall* v. *United States*, No. 06-7949 (June 11, 2007), to address the standard of review that courts of appeals should apply in assessing the reasonableness of out-of-Guidelines sen-

tences. The decision in *Gall* is likely to provide additional clarification on the role of the Sentencing Guidelines in the post-*Booker* sentencing regime. The decision may therefore provide the lower courts with insight into the importance of notice in achieving Rule 32's goal of full adversary testing of the issues relevant to sentencing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

STEPHAN E. OESTREICHER, JR.
Attorney

JULY 2007

Supreme Court, U.S.
FILED
JUL 3 1 2007
OFFICE OF THE CLERK

(3)

No. 06-1381

IN THE

Supreme Court of the United States

OMAR MEJIA-HUERTA, ANASTACIO PANTOJA-ARELLANO, JOSE ANDRES DEHUMA-SUAREZ, ANTONIO CRUZ-MARTINEZ, LUIS ESTRADA, AND TABRODRICK DESHAUN CRADDOCK,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

RICHARD ANDERSON
(*Counsel of Record*)
JERRY V. BEARD
FEDERAL PUBLIC
DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 Taylor Street, Suite 9A10
Fort Worth, Texas 76102
(817) 978-2753

WALTER DELLINGER
MARK S. DAVIES
SUSAN M. MOSS
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioners

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONERS.....1

I. THERE IS AN ACKNOWLEDGED, DEEP CIRCUIT SPLIT ON THE QUESTION WHETHER RULE 32(H)'S NOTICE REQUIREMENT SURVIVES BOOKER.....1

II. WHETHER RULE 32(H)'S NOTICE REQUIREMENT SURVIVES BOOKER IS AN ISSUE OF URGENT PRACTICAL IMPORTANCE WELL PRESENTED BY THIS CASE.....5

CONCLUSION.....10

TABLE OF AUTHORITIES

Page

CASES

United States v. Booker,
543 U.S. 220 (2005) ..... passim

United States v. Braxton,
No. 06-14852, 2007 WL 1198447 (11th Cir. Apr. 24, 2007) 2

United States v. Brooks,
No. 06-4696, 2007 WL 2004864 (4th Cir. Jul. 9, 2007) 2

Claiborne v. United States,
No. 06-5618 ..... 7, 8

United States v. Cousins,
469 F.3d 572, 581 (6th Cir. 2006) 2007 U.S. Dist. LEXIS 36254 (N.D. Ohio May 17, 2007) 3

United States v. Evans-Martinez,
448 F.3d 1163 (9th Cir. 2006) 3

United States v. Flanders,
No. 05-6379, 2007 WL 1894419 (10th Cir. July 3, 2007) 2

United States v. Florez,
163 Fed. App'x 806 (11th Cir. 2006) 4

Gall v. United States,
No. 06-7949 (June 11, 2007) 8

United States v. Garcia-Renteria,
No. 06-50410, 2007 WL 1219232 (9th Cir. Apr. 25, 2007) 2

United States v. Gilmore,
471 F.3d 64 (2d Cir. 2006) 470 F. Supp. 2d 233 (E.D.N.Y. 2007) 3

United States v. Johnson,
No. 05-61073, 2007 WL 1548990 (5th Cir. May 29, 2007) 2

United States v. Jones,
444 F.3d 430 (5th Cir. 2006) 4

United States v. Mateo,
179 Fed. App'x. 64 (1st Cir. 2006) 4

United States v. McClung,
483 F.3d 273 (4th Cir. 2007) 2

United States v. Morris,
No. 06-16138, 2007 WL 1198445 (11th Cir. Apr. 24, 2007) 2

United States v. Olano,
507 U.S. 725 (1993) 3

Rita v. United States,
177 F. App'x 357 (June 21, 2007) 7, 8

United States v. Rivero,
No. 06-14030, 2007 WL 1455761 (11th Cir. May 18, 2007) 2

United States v. Santos-Hernandez,
No. 06-16218, 2007 WL 1484521 (11th Cir. May 22, 2007) 2

RULES

Federal Rule of Criminal Procedure 32(h) ..... passim

OTHER AUTHORITY

U.S. Sentencing Commission: Fiscal Year 2006 Guideline Sentences, National Data, *available at* http://www.ussc.gov/ANNRPT/2006/nat06.pdf. 9

REPLY BRIEF FOR PETITIONERS

Though technically styled a Brief for the United States In Opposition, in substance the United States has all but acquiesced to certiorari. The petition presents two grounds for further review: (1) There is an acknowledged, deep circuit split on the question whether the notice requirement in Federal Rule of Criminal Procedure 32(h) survives *United States v. Booker*, 543 U.S. 220 (2005), and (2) The question of whether Rule 32(h)'s notice requirement survives *Booker* is an issue of urgent practical importance well presented by the sentences at issue here. The government agrees with the first claim, conceding there is a circuit split and, inadvertently, pointing out that the petition presents a second related question that also divides the circuits. The government cannot refute the immense practical importance of the basic rules governing criminal sentencing procedures. Review is warranted.

I. THERE IS AN ACKNOWLEDGED, DEEP CIRCUIT SPLIT ON THE QUESTION WHETHER RULE 32(H)'S NOTICE REQUIREMENT SURVIVES *BOOKER*

1. The petition identified a 5-5 circuit split on the question of the effect of *Booker* on Rule 32(h)'s notice requirement. Pet., at 16-22. The United States concedes, as it must, that "there is a conflict among the courts of appeals" on the question presented. U.S. Br., at 8. See also U.S. Br., at 12 ("the courts of appeals have reached differing conclusions on whether notice is required"); *id.* at 13 ("conflict among the courts of appeals"). The United States also agrees with the petition's description of the circuit disarray. As the United States notes, the "Second, Fourth, Sixth, Ninth, and Tenth Circuits have held that notice is required." U.S. Br., at 13. "The Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held to the contrary." U.S. Br., at 13.

Indeed, since the filing of the petition, circuit case law has cemented the split. *See, e.g., United States v. McClung*, 483 F.3d 273 (4th Cir. 2007) (notice of variances is required post-*Booker*); *United States v. Brooks*, No. 06-4696, 2007 WL 2004864 (4th Cir. Jul. 9, 2007) (same); *United States v. Garcia-Renteria*, No. 06-50410, 2007 WL 1219232 (9th Cir. Apr. 25, 2007) (same); *United States v. Flanders*, No. 05-6379, 2007 WL 1894419 (10th Cir. July 3, 2007) (same). *Cf. United States v. Johnson*, No. 05-61073, 2007 WL 1548990 (5th Cir. May 29, 2007) (no notice required for variances post-*Booker*); *United States v. Braxton*, No. 06-14852, 2007 WL 1198447 (11th Cir. Apr. 24, 2007) (failure to give notice of intent to vary upward is not error post-*Booker*); *United States v. Morris*, No. 06-16138, 2007 WL 1198445 (11th Cir. Apr. 24, 2007) (notice required only for departures, not variances); *United States v. Santos-Hernandez*, No. 06-16218, 2007 WL 1484521 (11th Cir. May 22, 2007) (same); *United States v. Rivero*, No. 06-14030, 2007 WL 1455761 (11th Cir. May 18, 2007) (same).

2. The petition also explains that Rule 32(h)'s notice requirement does in fact apply post-*Booker*, and that the decision below is erroneous. Pet., at 22-26. The petition points out that the text of the rule applies to sentences outside of the Guidelines range. Pet., at 23. The petition also shows that the purpose of the notice requirement applies to such sentences. Pet., at 23. If a district court intends to impose a non-Guidelines sentence, the parties need notice in order to present relevant evidence and argument. Pet., at 23.

Again, the United States agrees: "In the government's view, Rule 32's notice requirement applies" to non-Guidelines sentences. U.S. Br., at 10. As the government explains, "the parties need notice of the grounds on which the court is considering imposing a non-Guidelines sentence in order to ensure the full airing of the issues that will determine the sentence." U.S. Br., at 12. So too, the government

recognizes that the text of Rule 32(h) applies here. U.S. Br., at 10.

3. Furthermore, the government's brief inadvertently identifies a second circuit split presented by this case. In the government's view, three of the petitioners are entitled to relief "only if they could show plain error." U.S. Br., at 13. Of course, even if the error is not plain as to some defendants, the government does not dispute that several defendants properly preserved the issue. But in any event, the question of whether the failure to give Rule 32(h) notice to a non-Guidelines sentence post-*Booker* constitutes plain error itself implicates a circuit split warranting this Court's review.

The traditional plain error standard requires as a threshold (1) an error, (2) that is plain, and (3) that affects the defendant's substantial rights. *United States v. Olano*, 507 U.S. 725 (1993). The court only has discretion to notice such error and remand the case if (4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

Applying this standard, three circuits correctly find that failure to give notice can be plain error that does in fact affect the fairness of the proceeding such that remand is proper. *See, e.g.*, *United States v. Gilmore*, 471 F.3d 64 (2d Cir. 2006) *later proceeding at* 470 F. Supp. 2d 233 (E.D.N.Y. 2007) (finding that failure of the sentencing court to give notice of variance from Guidelines seriously affected the fairness, integrity, or public reputation of the sentencing proceeding and was plain error). *See also United States v. Cousins*, 469 F.3d 572, 581 (6th Cir. 2006), *later proceeding at* 2007 U.S. Dist. LEXIS 36254 (N.D. Ohio May 17, 2007) (finding that failure to give notice of a variance was noticeable plain error because defense counsel, with notice, could have prepared argument and evidence to persuade judge to give a within-Guidelines sentence); *United States v. Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006) (failure to

give notice under Rule 32(h) for out-of-Guidelines sentence was noticeable plain error because issues with potential to affect sentencing must be fully aired and tested by the adversarial process).[1]

In contrast to these three circuits, the First and Fifth Circuits have ruled that failure to give notice post-*Booker* may not rise to the level of plain error. In *United States v. Jones*, 444 F.3d 430 (5th Cir. 2006), the Fifth Circuit ruled that the error of not giving notice of an upward departure was not plain because "the record indicate[d] that it [was] equally plausible that the district court would have imposed the same sentence as it is plausible that the court would not have." *Id.* at 443. So too, the First Circuit ruled that failure to give notice is not plain error because that circuit has yet to decide whether notice is required post-*Booker*. *United States v. Mateo*, 179 Fed. App'x. 64, 65 (1st Cir. 2006). *Mateo* reasoned that because the law is not clear until the circuit or Supreme Court has ruled on the notice requirement, the error cannot be plain. *Id.*

Rather than a basis for denying review, the government's emphasis on the plain error issue relevant to some of the defendants serves to provide an additional rationale for granting certiorari. Review in this case will allow the Court to resolve both whether the notice requirement survives *Booker* and, if so, whether the failure to give notice is plain error. The circuits are split on both issues.

---

[1] The Eleventh Circuit does find noticeable plain error when a court fails to notify the parties of its intention to *depart* from the Guidelines, *see United States v. Florez*, 163 Fed. App'x 806 (11th Cir. 2006), but does not require notice of the intention to *vary* from them and thus would find no error when variances are imposed without notice.

II. WHETHER RULE 32(H)'S NOTICE REQUIREMENT SURVIVES *BOOKER* IS AN ISSUE OF URGENT PRACTICAL IMPORTANCE WELL PRESENTED BY THIS CASE

1. By its silence, the government concedes the great practical importance of the question presented. The petition points out that in the two and a half years since *Booker*, ten courts of appeals have issued published decisions on whether a district court must provide notice prior to issuing non-Guidelines sentences. Pet., at 27. The petition explains that this rapid and extensive appellate attention reflects the great importance the issue presents to the administration of the criminal justice system. Pet., at 27. The government does not respond to either claim.

Indeed, the facts of petitioners' cases here well illustrate the practical necessity of providing counsel with notice of an intent to apply a non-Guidelines sentence. For example, the petition noted that one defendant (Dehuma-Suarez) was sentenced to a term of imprisonment that was almost *8 years* greater than the recommended range. Pet., at 10. Although the district court claimed that the sentence was based on the petitioner's criminal record, the district court's failure to provide notice rendered the district court ill-informed about that criminal history. Thus, while the criminal history indicated convictions for Driving While Intoxicated and Assault Causing Bodily Injury, the district court did not know the potentially exonerating relevant facts. Had counsel known that the district court was planning to impose an increase of 8 years prison time based on this record, counsel could have contacted the step-children he supported for their testimony, spoken to his priest to attest to his five years of sobriety, and asked his co-workers and employers for testimony regarding his work ethic. Counsel could also have compared the con-

templated variance to the statistics on similar offenses maintained by the United States Sentencing Commission to determine what is customary in the same circumstances.

The same holds true for all the other petitioners, all but one of whom received sentences that were at least double the term recommended by the Sentencing Commission. In each instance, the district court punished the defendant on the basis of a terse written criminal history that may not have accurately represented his true past. Had the district court notified defense counsel of an intention to issue such sentences, there are numerous efforts counsel could have engaged in—such as investigating exonerating details of any listed crimes and interviewing relatives and others who may have compelling testimony about the social contributions of the defendant—to provide the court with a more accurate picture of the defendant's criminal history.

Although the government concedes the general importance of providing notice so that parties can present relevant evidence, the government nonetheless suggests that such notice would have no possible effect on the outcome here. U.S. Br., at 14. And, to be sure, petitioners' counsel are under no illusion that this particular district court judge would have imposed anything but the same (unfair) non-Guidelines sentences even if the court had been fully informed. The district court said as much, repeatedly stating it would impose the "same sentence" regardless of what the evidence showed. U.S. Br., at 14. But the very foundation of Rule 32(h)'s notice requirement is that a district court will consider relevant evidence provided by the defendant. That the district court makes a mockery of the core purpose of the rule does not warrant granting the court an exception from the rule, a rule that properly assumes that district courts will engage in a good faith consideration of all relevant facts. As just explained, there is no question that notice of the departure here would have led defense counsel to undertake a series of steps

designed to provide the district court with relevant evidence and argument.[2]

2. Anticipating the government's stalling tactic, the petition urges that the time for this Court to grant review is now. Pet., at 27. The petition notes that postponing review until the anticipated decisions in *Rita v. United States*, No. 06-5754, and *Claiborne v. United States*, No. 06-5618, is not necessary because neither case would possibly disturb the settled law that the Guidelines are an important factor in sentencing and thus that notice is required. Pet., at 28. The petition also explained that the earliest the Judicial Conference could amend Rule 32(h) to resolve the split is 2010. Pet., at 28-30.

As predicted, this Court's decision in *Rita* did not at all remove the need for this Court to review whether Rule 32(h) requires notice for a non-Guidelines sentence. *Rita v. United States*, 177 F. App'x 357 (June 21, 2007). As the government states, "*Rita* noted that the Guidelines still generally provide the framework for the sentencing process." U.S. Br., at 12. And, while *Rita* properly emphasizes the need for adversarial testing in sentencing, *Rita* does not address, much less reject, the rationale of those circuits that have declined to require notice post-*Booker*. In the view of those courts, notice is required only when a district court "departs" under the Guidelines but not when the court uses its post-*Booker* discretion to impose a non-Guidelines sentence. Nothing in *Rita* calls that formalistic rationale into question. To the contrary, *Rita* makes clear that it is concerned with "an *appellate* court presumption," a presumption that "applies only

---

[2] The evidence that could be presented by the provision of notice would serve a second purpose: it would form part of the evidentiary record for appellate review of the district court's sentencing decision. Thus, even if a sentencing judge refused to consider the evidence, that evidence would be part of the record in a subsequent appeal and could be used to reverse and remand on the bases of bias, procedural error, or the reasonableness of the sentence.

on appellate review." Slip Op., at 11. It has nothing to with the district court's conduct of the sentencing.

Undeterred by the obvious failure of *Rita* to resolve the conceded split, the government suggests that review would still be "premature at this juncture" (U.S. Br., at 17) because of the pending case, *Gall v. United States*, No. 06-7949 (June 11, 2007). As the government notes, that case—like *Claiborne* before its dismissal due to the death of petitioner—addresses the standard of review that courts of appeals should apply in assessing the reasonableness of out-of-Guidelines sentences. But, as with *Rita*, the case does not remotely bring into question the settled law that the Guidelines are an important factor in sentencing, does not implicate the formalistic rationale of the courts that refuse to require notice, and is addressed at appellate not district court actions. As with *Rita*, the decision in *Gall* will not resolve the question presented and thus provides no basis for delay.

In a last effort to avoid review, the government suggests that this Court wait until the Judicial Conference resolves the circuit split. U.S. Br., at 15. But, as the petition notes, the usual course is precisely the opposite: the Conference conforms the rules to decisions of this Court, and not the other way around. Pet., at 30. And even if the Conference was inclined to resolve this circuit split, it could not do so until *at the earliest* December 1, 2010. Pet., at 29 n.8. The government does not dispute the December 2010 timeframe. U.S. Br., at 15 ("assuming petitioners' calculations are correct"). Surely, the remote prospect of a change in the federal rules cannot suffice to justify this Court declining to resolve a deep circuit split on an issue of great practical consequence.

Specifically, from now until a rule change can possibly be put into place, district courts will sentence approximately 90,000 defendants to non-Guidelines sentences. In 2006, the

last year for which statistics are available, there were 70,187 defendants sentenced in federal district courts.[3] A very large number of these, 26,880, were sentenced outside of Guidelines range. Using these statistics as representative of future years, courts will sentence approximately 90,000 defendants between now and December 1, 2010 to sentences outside the Guidelines. Every one of those defendants is entitled to notice, not by the grace of the court but by virtue of the fundamental workings of the adversary process reflected in the plain text of the existing rule.

* * *

In sum, the government's brief confirms the need for further review here. The government agrees that there is a circuit split and agrees that the question is wrongly decided. The government cannot seriously dispute that the administration of the sentencing process raises an issue of great practical importance warranting prompt resolution. Indeed, the sentences here perfectly illustrate the need for notice so that counsel can conduct the additional investigation necessary to assure that the district court has all the relevant factual context before imposing lengthy non-Guideline sentences.

---

[3] U.S. Sentencing Commission: Fiscal Year 2006 Guideline Sentences, National Data, *available at* http://www.ussc.gov/ANNRPT/2006/nat06.pdf.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD ANDERSON
(Counsel of Record)
JERRY V. BEARD
FEDERAL PUBLIC
DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 Taylor Street, Suite 9A10
Fort Worth, Texas 76102
(817) 978-2753

WALTER DELLINGER
MARK S. DAVIES
SUSAN M. MOSS
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

July 31, 2007